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No. 92-239

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1992

AUGUST FRANCIS

PETITIONER

VERSUS

BENITA FRANCIS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 38 U.S.C. Section 3101, which prohibits the assignability of a veteran's disability benefits, preempts Louisiana State law which provides otherwise?

2. Whether Mr. Francis was competent enough and had the capacity to enter into a pre-divorce contract which settled the issue of post-divorce contract which settled the issue of post-divorce alimony to Benita Porter Francis when in fact Mrs. Francis knew or should have known that Mr. Francis was suffering from chronic paranoid schizophrenia with undergoing psychiatric treatment and taking medication before, during and after the making of this contract, and she further knew that Mr. Francis lacked the capacity to contract?

3. Whether as a matter of law mentally incompetent persons cannot contract when to do so would violate public policy?

LIST OF PARTIES

The names of all the parties to the proceedings below appear in the caption.

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IN THE

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JANUARY TERM 1992

AUGUST FRANCIS

PETITIONER

V.

BENITA FRANCIS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPINIONS BELOW

The opinion of the Louisiana State Supreme Court is reported at 586 So.2d 558. The opinion of the Fourth Circuit Court of Appeal is not yet reported. The opinion of the Civil District Court for the Parish of Orleans is reported at 529 So.2d No. 110.

JURISDICTION OF THE COURT

The judgment of the Civil District Court was rendered on February 13, 1989. The judgments of the Fourth Circuit was rendered on May 30, 1991. A judgment was rendered after a new trial in the Civil District Court on November 8, 1988. The judgment of the Louisiana Supreme Court was rendered on October 11, 1991. The jurisdiction of this court is invoked under 28 U.S. C. Section 1257.

STATUTES INVOLVED

1. Article VI Clause 2 of the United States Constitution mandates:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or laws of any State or the contrary notwithstanding.

2. 38(a) U.S.C. Section 3101 mandates in

pertinent part:

> Payments of benefits due or to become due under any law administered by the Veteran's Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of a beneficiary shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever either before or after receipt by the beneficiary.

STATEMENT OF THE CASE

Introduction

The principal focus of this case is the violation of the Supremacy Clause, Article VI, Clause 2 of the United States Constitution. Pursuant to the Supremacy Clause, federal statutes preempt the application of state law where Congress intentionally occupies the area of appropriation of disability benefits. Additionally, this case presents issues not

previously addressed by the U.S. Supreme Court. Principal among these unaddressed issues is the applicability of Federal Veteran's Disability statues to Louisiana Domestic Relations law. More specifically, 38 U.S.C. 3101 (a) exempts veteran disability payments from seizure or assignability. In the case at bar, the ruling below results in the assignment of Mr. Francis' veterans disability check to his former wife for alimony, a result which violates the letter and spirit of 38 U.S.C. 3101 (a). Another previously unaddressed issue is the proper interpretation of those provisions of law related to the "capacity to contract", as embodied in the Civil Code.

Due to the fact that the Supreme Court has not addressed these important issues previously, a WRIT OF CERTIORARI must be granted to clarify federal law, and cure the substantial injustice which occurred below.

STATEMENT OF THE FACTS

In 1945, August Francis was discharged from the military as a mentally incompetent, commonly known as "Section Eight Discharge." He received compensation from the Veterans Administration as one hundred percent (100%) disabled from his service connected condition from 1945 through the present date. He is not capable of employment as stated in a letter from the employment as stated in a letter from the Veterans Administration dated October 30, 1986, Exhibit D-3.

Benita and August Francis were married in 1957. On April 22, 1966, Mr. Francis was interdicted pursuant to La. R.S. 29:351 et seq., and Benita Francis was appointed as his curatrix. Mr. Francis left the marital home in 1972 and during the ten years thereafter they did not communicate.

In 1983, Mr. Francis commenced divorce proceedings against Mrs. Francis. His psychiatrist, Dr. Hector Valle, testified that he told Mr. Francis to get the advice of an attorney because "he was not in a condition to

make decisions by himself" (Proceedings September 2, 1987, tr. p. 36). After filing suit, August Francis obtained an uncontested judgment of divorce by default on February 23, 1983. Benita Francis did not attend the court proceedings.

Prior to the Judgment of Divorce, Benita Francis retained Robert Landry, Esq. to negotiate a contract with August Francis and his attorney, J. Brown LaRose, Esq. for the purposes of obtaining a portion of your petitioner's disability pension with the United States government. On February 10, 1983, Mr. Francis executed an affidavit which assigned a portion of his Veterans disability pension to Mrs. Francis. However, the Veterans Administration stopped payment to the former spouse in June, 1984. Mrs. Francis filed suit for support on October 16, 1986, seeking to enforce the affidavit or alternatively to obtain alimony.

COURSE OF THE PROCEEDINGS BELOW

This case has a rather lengthy procedural history.

Most recently, the Louisiana Supreme Court has denied review of this case. The Fourth Circuit Court of Appeal affirmed the Civil District Court's decision holding that the petitioner was competent, the contract was valid, Mr. Francis was bound by its terms to pay $401.00 per month as alimony to Benita Francis, and also overruling Mr. Francis' Exception of No Cause of Action.

This matter was initially tried on September 28, 1987 before Judge Max Tobias, of Civil District Court for the Parish of Orleans where judgment was rendered in favor of Mr. Francis finding the affidavit null, void, and unenforceable. The petition for support was dismissed. Mrs. Francis appealed this ruling arguing that the interdiction of Mr. Francis was a limited one and that Louisiana law did not preclude the enforcement of the affidavit. The Fourth Circuit reversed, ruling that Mr. Francis was not prohibited from contracting

with Mrs. Francis to assign to her a portion of his benefits since the powers of curatorship were limited to those listed in the judgment of appointment. Mrs. Francis also argued that the trial court's record was not complete because she was giving an opportunity for rebuttal. The matter was therefore reversed and remanded.

The case was then again before Judge Max Tobias on November 4, 1988, where he reversed his earlier decision and held that the affidavit was binding. Mr. Francis filed for a new trial and his motion was granted. Again, the trial court ruled in favor of Mrs. Francis. Mr. Francis appealed that decision to the Fourth Circuit, and also filed an Exception of No Cause of Action in the Court of Appeal. The Fourth Circuit in a two page ruling affirmed the trial court, failing to address the applicability of 38 U.S.C. 3101 to Louisiana Domestic law but ruling that Mr. Francis was competent, the contract was valid, and Mr. Francis was bound by its terms.

REASONS FOR GRANTING THE PETITION

I. PURSUANT TO THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, THE FEDERAL STATUTE 38 U.S.C. SECTION 3101 PREEMPTS LOUISIANA DOMESTIC LAW BECAUSE CONGRESS INTENTIONALLY EXCLUSIVELY OCCUPIES THE FIELD OF VETERANS' DISABILITY BENEFITS. THE APPLICATION OF THIS FEDERAL STATUTE INVALIDATES THE AFFIDAVIT EXECUTED BY MR. FRANCIS.

The case presents important questions concerning the application of 38 U.S.C. Section 3101, which prohibits the assignment and attachment of Veteran's disability benefits. The Louisiana Courts rendered an ultimate decision determining otherwise. Petitioner respectfully requests the U.S. Supreme Court to review this case in light of the fact that the federal statute preempts state domestic laws. Moreover, this is a rare instance where Congress has intentionally, directly, and specifically, legislated in the area of domestic relations. It would be a direct violation of the Supremacy Clause of the U.S. Constitution to permit Louisiana law to prevail in this matter.

Louisiana Courts have rendered a decision

that conflicts with the federal statutes. The prohibition of a federal statute may not be set at naught, or its benefits denied by state statutes or common-law rules. Sola Electric Co. v. Jefferson Electric Co., 63 S.Ct. 172, 317 U.S. 173, 87 L.Ed 165 (1942). Additionally, any state legislation which frustrates full effectiveness of federal law is rendered invalid by the Supremacy Clause. Perez v. Campbell, 91 S.Ct. 1704, 402 U.S. 637, 29 L.Ed 2d 233 (1971). In the instant case, the Supremacy Clause is very germane to the issue at hand.

In the recent case of Mansell v. Mansell, 109 S.Ct. 2033 (1989), the Supreme Court per Justice Marshall held that military retirement pay that had been waived by the former husband in order to receive veteran's disability benefits was not community property divisible upon divorce. Citing a former case relevant to Mansell, the court reasoned that Congress intended that military retirement pay reach the veteran and no one else. McCarty v.

McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed 2d 589 (1981). In addition, the court relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. Id. at 228-232, 101 S.Ct., at 2739-2741.

Mansell is analogous to the case at bar. Major Mansell is a disabled veteran who entered into a property settlement which provided, in part, that he would pay 50 percent of his total military retirement pay including his disability benefits. Major Mansell's sought recision of the divorce decree but his request was denied by all the lower California courts. Finally, the U.S. Supreme Court ruled in Major Mansell's favor after careful determination of the issues and finding that the relevant federal statutes preempts California domestic laws.

Petitioner Francis' case is not much different from the Mansell case. Petitioner is a retired veteran who also entered into a

settlement with his ex-spouse permitting her to receive $401.00 month of his veteran's disability pay. Petitioner seeks to rescind the agreement based on the ground that his disability benefits are excluded from assignment by his ex-spouse via post-divorce contract pursuant to 38 U.S.C. Section 3101.

The statutory provision 38 U.S.C. Section 3101 (a) mandates in pertinent part:

> Payments of benefits due... shall not be assignable except to the extent specifically authorized by law, and such payments.. shall not be liable to attachments, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary.

The plain language of Section 3101 (a) prohibits any seizure of veteran's benefits. There is no plausible explanation that Congress would have written specific exceptions for disability pay if it had contemplated that Louisiana Courts would enter orders such as were entered against the petitioner in the instant case. The unambiguous letter of the federal statute

coupled with the obvious intent of Congress is proof in and of itself that veteran's disability benefits cannot be subjected to any contractual obligations via assignments, attachments, or any seizures whatsoever.

Additional support is evidenced by a Veterans Administration letter, dated October 30, 1986, to whom it may concern states:

> The Veterans Administration has no authority to apportion VA benefits to a divorced spouse per 38 U.S.C. Section 3107 and Section 101 (31). Title 38 U.S.C. 3101 defines a non-assignability and exempt status of Veterans Administration benefits.

The provision of this section that payments of benefits under any law administered by the Veterans Administration shall be exempt from the claim of creditors is intended to protect the recipient of these benefits. State ex-rel. Eastern State Hospital v. Beard, 600 p.2d 324 (Okl. 1979). Additionally, a Texas court held that an award for divorced wife of 50% of her husband's anticipated future disability benefits from the Veterans Administration conflicted with the clear intent of Congress

that such benefits should be solely for the use of disabled Veterans, and the diversion of future payments was in conflict with the exemption provision of this section. Ex-parte Johnson, 591 S.W. 2d 453 (Tx. 1979); See also Inzinnia v. Inzinnia 456 So.2d 691 (La. App. 5th Cir. 1984) (holding that pursuant to 10 U.S.C.A. Section 1408 (a) (1) former wife was not entitled to former husband's military disability pension).

Federal courts have held that the protection of the Veteran's rights under Section 3101 should be exempt from creditor claims against the benefits and that Section 3101 must be liberally construed to protect funds granted by Congress for the maintenance and support of eligible veterans. Accordingly, any legal formulation or arrangement which could dilute or evade the literal and historical thrust of this sections's protection provision must be viewed with appropriate caution. American Training Service, Inc. v. Veterans Administration 434 F. Supp 1988 (D.N. J.

1977); See also Porter v. Aetna Casualty and Surety Company 370 U.S. 159, 82 S.Ct. 1231 (1962) (holding that Section 3101 should be liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof); Lawrence v. Shaw 300 U.S. 245, 57 S.Ct. 443 (1937). To award Mrs. Francis portion of her ex-husband's disability benefits, under the supremacy clause, would impermissibly conflict with the provisions of Section 3101. Under the analysis of Johnson supra, to order Mr. Francis to pay his ex-wife a portion of his disability compensation, or its monetary equivalent, would run contrary to the language and purpose of the statute which exempts funds from the legal process and is intended to insure that benefits actually reach the intended beneficiary. Id at 455.

Again, "payments of benefits due... by the Veterans Administration shall not be assignable except to the extent specifically authorized by law,..." pursuant to 38 U.S.C.

Section 3101 (a). This statute clearly mandates that VA benefits are non-assignable unless authorized by the law. One of the very essence of contract law is that one must have the mental capacity to contract. In otherwords, the law does not authorize and it is against public policy to contract with a person lacking the competence to do so. Because the law does not authorize or condone contracting with a mentally incompetent person; the law does not authorize the assignment of VA benefits by a contract entered into with a person lacking the capacity to contract. The law of non-assignable VA benefits (38 U.S.C. Section 3101 (a)) and the law of capacity to contract (L.S.A. C.C. Art. 1918) are both a part of this state's judicial principles and guidelines. To enforce one and not the other would be a grave injustice.

Not only does 38 U.S.C. Section 3101 mandate that VA benefits are non-assignable, but it also states that such payments "shall be

exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary." The words "any legal or equitable process whatsoever" clearly suggests Congress' intent to ensure that Veterans benefits, such as Mr. Francis', are protected and secured for the sole purpose of disabled veterans use and maintenance for as long as the veteran is eligible to collect such benefits. Even if the alimony contract that Mr. Francis entered into had been legal and binding, Congress prohibits Mr. Francis' disability check from being subject to any such legal or equitable process. This statute is clearly designed to protect disabled veterans. Congress anticipated that there would be disabled veterans such as Mr. Francis, unable to handle his own affairs because of a mental condition. Therefore, Congress provided this statute to protect those veterans that are unable to

protect themselves. For this State not to enforce the very wishes of Congress would be a great injustice to the American veterans, and it would shock the conscious of society. Accordingly, the affidavit executed by Mr. Francis which assigned a portion of his disability compensation to Mrs. Francis is unlawful. Hence, the affidavit fails to constitute a valid contract because it was made for an unlawful cause.

II. THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF LOUISIANA DOMESTIC LAW WHERE THE COURTS ERRED IN DETERMINING THAT MR. FRANCIS HAD THE CAPACITY TO CONTRACT ON FEBRUARY 10, 1983.

In Louisiana, the law presumes capacity to contract La. Civil Code Art. 1918 provides:

> All persons have capacity to contract, except an emancipated minor, **interdicts and persons deprived of reason at the time of contracting.**

Such exemptions must be shown quite convincingly by the great weight of the evidence. First National Bank of Shreveport v. Williams 346 So.2d 257 (La. App. 3d Cir.

1977); Interdiction of Burns 486 So.2d 977 (La. App. 1st Cir. 1986).

The manifest error standard of review is inappropriate in the case at bar. The manifest error rule of appellate review weight only to the trial court's actual findings. The findings of the trial court will not be taken as conclusive on the issue of the probative value of testimony. Barriffe v. Ortiz 476 So.2d 371 (La. App. 4th Cir. 1985). Accordingly, in an evaluation of the sufficiency or preponderance of the evidence, the manifest error rule is inapplicable. Id. Furthermore, in determining mental capacity, great weight must be given to the testimony of the attending physician. See Succession of Lafferanderie 84 So.2d 442 (La. 1955).

A. Appellant has met his burden of proving incapacity through the unrefuted testimony of his psychiatrist.

The record clearly shows by undisputed facts that Mr. Francis was discharged from the military in 1945 as a mentally incompetent

person and he had qualified for 100% disability payments. Mr. Francis suffers from chronic paranoid schizophrenia and has been receiving psychiatric treatment and medication at the Veterans Administration Hospital in New Orleans for well over seventeen years.

The evidence previously introduced in trial court consisted of five exhibits as follows:

> Exhibit D-1, medical record of the patient August Francis from Veterans Administration Medical Center for the period February 1, 1982 through November 29, 1983;
>
> Exhibit D-2, letter from R.L. Stone, M.D., to Veterans Administration contact office dated January 4, 1973;
>
> Exhibit D-3, memorandum "To Whom it May Concern" from J.P. Clark, Veterans Services Officer dated October 30, 1986;
>
> Exhibit D-4, medical record of patient August Francis from the Veterans Administration Medical Center for the period June 12, 1980 through May 29, 1987;
>
> Exhibit D-5, entire record and proceedings No. 447-936 of the Civil District Court entitled Curatorship of August Francis.

In February of 1982, Mr. Francis was under the treatment and care of his psychiatrist, Dr. Hector J. Valle. On September 2, 1987,

Dr. Valle testified with respect to the condition of Mr. Francis in February of 1983. Dr. Valle testified that Mr. Francis' condition was diagnosed as chronic paranoid schizophrenia with **marginal** adjustments due to medications. (Emphasis Added) (Exhibit D-4 complete report of Veterans Administration dated July 24, 1984, problem oriented progress notes dated September 5, 1982) 88 CA-0076 Vol. II, tr. p. 33) Dr. Valle further testified that Mr. Francis suffered delusion, distortions of reality. Dr. Valle stated that Mr. Francis had "delusions quite frequently." (88-CA-0076 Vol. II, tr. pp. 37-39).

Dr. Valle further testified that although Mr. Francis was not acting out in any way, "his capacity to function was diminished tremendously at times." (88-Ca-9976, Vol. II, tr. p. 36).

On August 5, 1982, Dr. Valle prescribed "Thorazine 50 mgr. one bid and II at hs #120; Stelazine 2 mgr. one QID #120; Cogentin 2 mgr. daily #0; Tylenol tablets II PRN pain #50; and

Mylanta Tsp one P/C and PRN #5 bottles" for Mr. Francis. The foregoing is set forth in the medical record from the Veterans Administration, Exhibit D-1. Moreover, Exhibit D-1 dated February 4, 1983 states "PLAN: to avoid hospitalization by keeping him on drug therapy. Will continue with 1) Thorazine; 2) Stelazine; 3) Cogentin; 4) Tylenol; 5) Mylanta". Id. (Emphasis Added).

The fact that Mr. Francis was taking medication did not make him totally capable according to Dr. Valle. (88-CA-0076. Vol. II, tr. p. 39). Dr. Valle testified that as long as Mr. Francis took medication, "he was not acting out in any way, but, of course, he was -- his capacity to function was diminished tremendously at times." (88-CA-0076 Vol. II, tr. p. 38). Additionally, Dr. Valle stated that the fact that Mr. Francis took medication did not make him totally capable. (88-CA-0076 Vol. II, tr. p. 39). When asked if his patient's judgment could have been affected in any contracts that he may have made, Dr. Valle

responded "absolutely". (88-CA-0076, Vol. II, tr. p. 40).

Dr. Valle also testified that Mr. Francis was very self-conscious about his disability and about other peoples' opinion of him. Mr. Francis believed that people were making fun of him; he also believed that his wife wanted to tell everyone that he was a metal case. (88-CA-0076 Vol. II tr. pp. 37-38). Dr. Valle further testified that Mr. Francis was constantly fearful of psychiatric in-patient services on the ninth floor at the Veterans Administration Hospital. "I don't recall exactly the date, but sometimes I thought he may need to be hospitalized, but Mr. Francis was so scared of the ninth floor in-patient service, he was so scared, he said "No, please don't put me in the hospital." (88-CA-0076 Vol. II, tr. pp. 39-40).

The medical testimony presented by Dr. Valle on-behalf of Mr. Francis is unrefuted. Mrs. Francis has not put on medical evidence to rebut the testimony of Dr. Valle. The trial

court relied on the lay testimony of Mr. LaRose in determining whether Mr. Francis was deprived of reason on February 10, 1983.

Hence, the court erred in attributing any weight to the lay testimony presented. Louisiana jurisprudence have held that where there is no conflict in expert testimony, lay testimony will not be taken into consideration. Redmond v. Quachita Coca-Cola Bottling Company, 76 So.2d 553 (La. App. 2d Cir. 1954). The courts have stated that medical testimony should be conflicting before any significant value is attributed to lay testimony about an individual medical condition. O'Quin v. Southern Pipe and Supply Company 216 So.2d 320 (La. App. 3d Cir. 1968); See also Jackson v. United States Fidelity and Guaranty Company, 382 So.2d 223 (La. App. 3d Cir. 1980) (holding that uncontradicted testimony of the psychiatrist concerning his diagnosis should have been given greater weight). Additionally, it is well settled that testimony of the attending physician

should be given great weight. See generally Johnson v. R.P. Farnsworth and Company 186 So.2d 405 (La. App. 1st Cir. 1966).

In Interdiction of Burns, 486 So.2d 977 (La. App. 1st Cir. 1986), plaintiff filed suit to rescind a pre-interdiction contract. The trial court found that the plaintiff did not have proper mental capacity to contract. The court's decision was based on the deposition of an expert in the field of psychiatry and the failure of the defendants to produce medical testimony. Id. at 979. The appellate court affirmed that decision. The Burns analysis is applicable to the instant case. Here, the trial court erred by failing to give the unrefuted and uncontradicted medical testimony of Mr. Francis' treating psychiatrist, Dr. Valle, great weight. In fact, under the Redmond rule, the lay testimony of Mr. LaRose should not have been taken into consideration at all. Thus, under Redmond and Burns, Mr. Francis has shown quite convincingly and by great weight of the

evidence that he lacked capacity to execute a contract on February 10, 1983. Accordingly, pursuant to the Louisiana Civil Code Article 1918, Mr. Francis was deprived of reason at the time of the contracting and thus did not have capacity to contract.

B. Mrs. Francis knew or should have known that Mr. Francis was mentally disabled.

Louisiana Civil Code Article 1925 provides as follows:

> A noninterdicted person who was deprived at the time of contracting, may obtain recision of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity.

On April 21, 1966, Mrs. Benita Francis filed a Petition for the Interdiction of Mr. Francis pursuant to La. R.S. 29:351 et seq. A certificate of incompetency executed by the Chief Attorney of Veterans Administration was attached to that petition. This document certified that Mr. Francis had been rated incompetent by the Veterans Administration on an examination dated July 16, 1959. (See 88-

CA-0076, Supplemental Transcript).

On October 16, 1968, Mrs. Francis filed a petition seeking support from Mr. Francis. Paragraph VI of said petition states:

> "Upon information and belief, defendant-(Mr. Francis) is mentally disabled and continues to receive Veterans Administration disability payments." (88-CA-0076 Vol. I Petition for Support)."

Moreover, in proceedings held on February 12, 1988, Mrs. Francis admitted that Mr. Francis was hospitalized because of his mental condition. (89-CA- 1292 Vol. II tr. p. 20). Mrs. Francis further admitted she went to the social worker at the Veterans Administration. (89-CA-1292, Vol. I, tr. p. 10). Most tellingly, Mrs. Francis admitted that Mr. Francis received a check for 100% disability (the subject of this litigation because of his mental condition). (89-CA-1292, Vol. II tr. pp. 17-18). Accordingly, Mrs. Benita Francis knew or should have known that Mr. Francis suffered a 100% mental disability. Thus under Louisiana Civil Code Articles 402, 1918, and

1925, a contract in which Mr. Francis assigned a portion of his Veterans disability pension to Mrs. Francis is null and void because Mr. Francis lacked capacity to contract, and Mrs. Francis knew or should have known of his incapacity.

Furthermore, in the case of Fidelity Financial Services, Inc. v. McCoy, 392 So.2d 118 (La. App. 1st Cir. 1980), the Court of Appeal of Louisiana affirmed the district court's decision in finding that the defendant lacked mental capacity to contract, that his condition was common knowledge in the community, and that the incapacity existed at the time of the contract. In the case of Fidelity Financial Services, Mr. McCoy was discharged from the U.S. Army in 1960 because of his mental condition, and he has been receiving psychiatric treatment and medication at the V.A. hospitals in New Orleans and Gulfport ever since. His wife, son, and two other persons from the community testified that they knew and that it was commonly known

in the communities that defendant was mentally incapable of handling his affairs. Mr. McCoy had later been interdicted. Mr. McCoy entered into a contract securing a loan for the purchase of an automobile, which was the subject of the suit. The plaintiff's only witness testified that "Mr. McCoy appeared to be normal." Id. at 119. The court implies that the plaintiff had the burden of proof in establishing that the contract was made during lucid intervals in order to make any attempts to avoid defendants' defense of insanity. The Fidelity case is analogous to the case at bar. Both cases involve discharged veterans on 100% disability, unable to handle their own personal affairs, and commonly known throughout the community to be mentally incompetent. More importantly, both Mr. McCoy and Mr. Francis were two incompetent individuals undergoing psychiatric treatment and medication before, during, and after the making of the contracts in dispute; and lacking the full capacity to enter into any

legally binding affair, although they both "appeared" to be normal.

In Fidelity, "the plaintiff failed to carry his burden of proof that the contract was made during a lucid interval." Id. at 119. Dr. Valle testified as to Mr. Francis having marginal adjustments due to his medication. Mr. Francis contends that Mrs. Francis failed to establish as a matter of fact that the freely bargained and mutually consented to a pre-divorce alimony contract during a time he experienced a lucid interval if indeed he experienced any marginal adjustment at all. This court should render any doubts in favor of Mr. Francis and adopt the decision of the court in Fidelity by rescinding the alimony contract.

III. THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF LOUISIANA DOMESTIC LAW BECAUSE THE COURTS FAILED TO GRANT MR. FRANCIS' NO CAUSE OF ACTION BASED ON THE PROVISIONS OF 38 U.S.C. 3101 WHERE THE CONTRACT LACKS CONSIDERATION AND VIOLATES BOTH STATE AND FEDERAL LAW.

The decision of the Louisiana Courts violate

basic contract law. There are four elements required for the confection of a valid contract: 1. The parties must have capacity to contract;

2. The contract must have a lawful purpose;

3. There must be certain objects for the contract; and

4. The parties' mutual consent must be freely given.

The document at issue in the instant litigation fails as a valid contract on all four points. First, Mr. Francis lacked capacity to contract, and Mrs. Francis knew that Mr. Francis was incompetent and deprived of reason at the time of contracting as stated above. Because Mr. Francis was incapacitated he was incapable of freely giving consent by operation of law.

Second, the contact at issue does not have a lawful purpose. La. Civil Code Art. 1968 defines unlawful cause as follows:

> The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

Furthermore, pursuant to La. Civil Code Art. 1894, obligations which are exempt from seizure are not subject to compensation.

In reasons for the judgment dated November 8, 1988, Judge Tobias determined that Mrs. Francis gave up contesting the divorce in exchange for her continued receipt of a portion of the disability pension. At trial on February 12, 1988, Mr. Francis testified that he believed Mrs. Francis wanted to have him committed; he also stated that Mrs. Francis tormented him. (89-CA-1292, Vol. II, tr. pp. 83, 86, 89). As previously stated by Dr. Valle, Mr. Francis lived in constant fear of re-hospitalization. On September 2, 1987, Mr. Francis testified that he believed that the only way that he could get a divorce was to sign the affidavit. "Her attorney, Spencer is the one who had written this thing up. My attorney never did write anything up, he said this is the only way I would be able to get a divorce if I would sign that. I didn't know

what I was doing." (88-CA-0076, Vol. II tr. p. 10). Most importantly, on February 33, 1989, Mr. LaRose, who represented Mr. Francis in the divorce proceedings, stated that the affidavits made divorce simpler.

Q. You said that you prepared the affidavit for four hundred dollars a month for life?

A. That is correct.

Q. Did that make the divorce simpler?

A. Let me explain something to you, yes I did make it simpler and I would like to explain that.

(89-CA-1292,Vol. III, tr. p. 12).

The affidavit, however, did not make the divorce simpler. Mr. Francis was entitled to a divorce as a matter of law based on having lived separate and apart from his wife for more than one year. Moreover, his pre-existing mental problem excused him from fault. Dolese v. Dolese 517 So.2d 1279 (La. App. 4th Cir. 1987) (affirming the decision of Judge Tobias that the findings that the husband suffered from mental incapacity is sufficient to excuse him from fault was

adequately supported by evidence regarding his periodic treatment for mental problems, notwithstanding or the lack of medical testimony in the divorce action). Accordingly, because of no benefit accrued to Mr. Francis, the contract was invalid for failure of consideration. See generally Interdiction of Burns, supra. (holding that transfer of property was invalid due to a failure of consideration). To uphold the contract would unjustly enrich Mrs. Francis. Pursuant to La. Civil Code Art. 1988, Mr. Francis had no cause to assign a portion of his disability benefits to his ex-wife. At such, the affidavit is null, void and unenforceable.

Louisiana Code of Civil Procedure Article 2163 provides in pertinent part:

> The appellate court may consider the preemptory exception filed for the first time in that court, if it is pleaded prior to submission of the case for a decision, and if proof of the ground of the exception appears of record.

See also: Sanders v. P & S Ins. Co. 125

So.2d 24 (La. App. 1961). Due to the applicability of 38 U.S.C. 3101, the original petition of Mrs. Francis fails to state a cause of action. Her original suit was for a "portion of his monthly federal disability payments" See the Court of Appeal's first opinion in Francis v. Francis 529 So.2d at 111 (La. App. 4th Cir. 1988). Because she is not entitled as a matter of law, to these benefits, her petition does not state a cause of action. The Court of Appeal erred by overruling the Exception of No Cause of Action and also by not even discussing the construction of 38 U.S.C. 3101 to the case and facts at bar. Only intervention by this court can correct this grievous error.

CONCLUSION

Petitioner respectfully submits that this case should be granted Certiorari to prevent injustice and wrongful application of federal and state law as applied by the lower courts.

The central focus of this matter is the Supremacy Clause of the U.S. Constitution.

The spirit and letter of the Supremacy Clause mandates that any state law inconsistent with any federal law shall be deemed invalid. It is quite clear and could not be more apparent that Congress intended to occupy the area of veterans' disability benefits. Accordingly, Congress enacted 38 U.S.C. Section 3101 directly expressing its intent to occupy the field. This provision prohibits the assignment, attachment, or seizure whatsoever by any legal process of any veterans' disability benefits for however long the veteran is entitled.

Conversely, Louisiana domestic laws are inconsistent with the federal rule. The lower courts determine judgments based on improper application of the law. In addition, the local courts failed to apply the proper law in this case, 38 U.S.C. Section 3101. Failure to apply the federal statute in this case would violate the Supremacy Clause. Louisiana domestic law cannot be enforced nor can it be applied where it prevents the exercise of

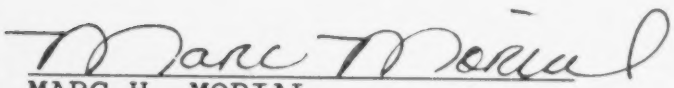
rights guaranteed by the U.S. Constitution and laws enacted by Congress.

Alternatively, petitioner respectfully submits that the unrefuted testimony of Dr. Valle, Mrs. Francis' treating psychiatrist, clearly and convincingly establish that Mr. Francis lacked capacity at the time he executed the affidavit. Because there was no conflict in medical testimony, the lay testimony should not have been taken into consideration. As such great weight should have been accorded to the testimony of Dr. Valle. Thus, Mr. Francis met his burden of proving incapacity. In addition, in the original petition filed for support, Mrs. Francis admitted that her ex-husband was mentally disabled at the time that he executed the affidavit. Appellant further submits that the affidavit is an invalid contract as a matter of law. Mr. Francis did not have the capacity to contract; as such he was unable to truthfully give his consent. Furthermore, pursuant to 38 U.S.C. Section 3101, Mr.

Francis' disability benefits are exempt from the claims of his creditors, Mrs. Francis. Congress intended to protect disabled veterans benefits from any legal process whatsoever. Mr. Francis' disability checks are prohibited as a matter of law from being subject to any contract, valid or not. Thus under Louisiana law, cause of this obligation is unlawful and unenforceable. Finally, appellant suggests that the affidavit is unenforceable due to failure of consideration. For the foregoing reasons, appellant respectfully requests that this Honorable Court reverse the lower courts decisions that Mr. Francis had capacity to contract on February 10, 1983, and that the affidavit executed by Mr. Francis constituted a valid contract. Petitioner further requests that this court grant Certiorari.

Respectfully Submitted:

MARC H. MORIAL, A PROFESSIONAL LAW CORPORATION



MARC H. MORIAL
210 O'KEEFE AVENUE
SUITE 900
NEW ORLEANS, LA 70113
(504) 588-9171
BAR NO. 8452

ATTORNEY FOR AUGUST FRANCIS,
PETITIONER

STATE OF LOUISIANA

PARISH OF ORLEANS

Marc H. Morial, being duly sworn, desposed and said that he is the attorney for the petitioner in the above and foregoing application for Writ of Certiorari; that a copy of the application has been mailed to respondent Benita Francis through her attorney Robert Grant, Esq., 238 Huey P. Long Avenue, P.O. Box 484, Gretna, Louisiana 70054 this 15 day of June, 1992.

Marc H. Morial

MARC H. MORIAL

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 15
DAY OF June, 1992

Chet Cutter

NOTARY PUBLIC

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DOMESTIC RELATIONS II

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

FILED_____ _____
DEPUTY CLERK

PETITION FOR SUPPORT

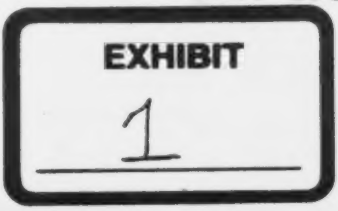
NOW INTO COURT, through undersigned counsel, comes Benita Francis who respectfully states that:

I.

Plaintiff, Benita Francis, is a person of full age of majority and is domiciled in Orleans Parish. Defendant, August Francis, is a person of the full age of majority and is domiciled in the Parish of Orleans.

II.

Plaintiff and defendant were married in Orleans Parish in or about 1957.



III.

Of the union between plaintiff and defendant, four children were born. Another child which was born to defendant and another woman, was raised by plaintiff and defendant. The five children are all of the age majority.

IV.

On February 10, 1983, defendant signed an affidavit starting that, in consideration of the fact that the plaintiff had raised the children and was in necessitous circumstances, he agreed that plaintiff would receive $401.00 per month for her support. She would continue to receive that amount after their divorce and for as long as defendant received his disability benefits. A copy of the Affidavit is attached hereto as Exhibit A.

V.

Plaintiff and defendant were divorced on February 23, 1983, in Civil District Court for the Parish of Orleans, suit number 82-19357.

VI.

Upon information and belief, defendant is

mentally disabled and continues to receive Veterans Administration disability payments.

VII.

Defendant ceased making support payments of $401.00 per month in June, 1984, and is currently in arrears in the amount of $11,228.00.

VIII.

Plaintiff was not at fault in causing the breakup of the marriage.

IX.

Plaintiff is without sufficient means of her own support and requires support from defendant.

WHEREFORE, plaintiff Benita Francis prays that defendant August Francis be ordered to show cause, on a date and at an hour to be set by this Honorable Court, why past due support payments in the amount of $11,228.00, or such other amount of arrearage as may be proved at the hearing on this rule, should not be made executory, why he should not be ordered to make future support payments.

Plaintiff further prays that she be granted an assignment of defendant's income, in accordance with LSA-R.S. 46:236.3 (B).

Respectfully Submitted:

LOYOLA LAW SCHOOL CLINIC

BARRY P. VICE
Student Practitioner

LEON CAMBON
Supervising Attorney
7214 St. Charles Avenue
P.O. Box 902
New Orleans, LA 70118
(504) 861-5590

PLEASE SERVE:

AUGUST FRANCIS
5179 MUSIC STREET
NEW ORLEANS, LA 70151

O R D E R

CONSIDERING THE FOREGOING PETITION,

IT IS HEREBY ORDERED that defendant August Francis show cause, on the 6th day of November, 1986, at 9;00 a.m. why past due support payments, in the amount of $11,228.00 or such other amount as may be proved at the

hearing on this rule, should not be made executory and why he should not be ordered to make future support payments.

New Orleans, Louisiana this 20 day of October, 1986.

MAX N. TOBIAS, JR.
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DOMESTIC RELATIONS
SECTION 2

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

FILED_____ _____
DEPUTY CLERK

SUPPLEMENTAL AND AMENDING ANSWER TO PETITION FOR SUPPORT

NOW INTO COURT, through undersigned counsel, comes August Francis, and respectfully supplements and amends his answer to the petition for support as follows:

IV.

The affidavit which defendant in Rule signed is not a Court Order or Judgment or binding contractual obligation. The parties were at the time of its execution still married and could not legally contract and there was in fact no consideration.

WHEREFORE, the premises considered, defendant in Rule prays that his answer and

supplemental and amending Answer to Petition for Support be deemed good and sufficient, and accordingly, that plaintiff demands be dismissed with prejudice, and at her costs.

CHARBONNET & CHARBONNET
3750 S. Claiborne Avenue
New Orleans, LA 70125
Telephone: (504) 891-5841

BY: _____
ROBERT P. CHARBONNET

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Pleading has been served upon counsel of record for all parties hereto by depositing same in the United States mail, postage prepaid, this 6th day of November, 1986.

_____
ROBERT P. CHARBONNET

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DOMESTIC RELATIONS
SECTION 2

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

FILED_____ _____
DEPUTY CLERK

ANSWER TO PETITION FOR SUPPORT

NOW INTO COURT, through undersigned counsel, comes August Francis and respectfully answers the allegations of plaintiff's Petition for Support as follows:

I.

Admitted.

II.

Admitted.

III.

Denied, except to admit that four children were born of the union between plaintiff and defendant and another child was born to plaintiff and another man which child was

raised by plaintiff and defendant, and this child as well as defendant's four children are of the age of majority.

IV.

Denied, except to admit that defendant did sign the affidavit although he did so not completely understanding same and was without the benefit of counsel, and while he was unfortunately mentally disabled.

V.

Admitted.

VI.

Admitted.

VII.

Denied, except to admit that when the Veterans Administration discovered that plaintiff and defendant were divorced, they immediately cut off the $401.00 payment in approximately June, 1984, which payment had previously been mailed to plaintiff for the reason that while plaintiff and defendant were separated, the Veterans Administration did allow for an allocation for the $401.00 a

month to be mailed to plaintiff, but their regulations do not permit the allocation of their benefit to be paid to a divorced wife.

VIII.

Denied, and defendant further answers that the divorce judgment is a final judgment, and plaintiff has not timely proven that she was free from fault for the cause of the breakup of the marriage.

IX.

Denied for lack of sufficient information to justify a belief therein.

WHEREFORE, petitioner prays that this answer be deemed good and sufficient, and accordingly, that plaintiff's demands be dismissed with prejudice and at her costs.

CHARBONNET & CHARBONNET
Attorneys for Defendant
3750 South Claiborne Avenue
New Orleans, LA 70125
Telephone: (504) 891-5841

ROBERT P. CHARBONNET

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon all counsel of record by depositing same in the U.S. Mail this ____day of November, 1986.

_____

ROBERT P. CHARBONNET

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DIVISION 1 DRS-2

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

FILED_____ _____
DEPUTY CLERK

JUDGMENT

This matter came for trial on 3 February 1989 on the new trial ordered by this Court on 20 December 1988.

PRESENT: Phillip Spencer, Attorney for August Francis
Leon Cambon and Demetra Kringas, Attorneys for
Benita Francis

For the written reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the affidavit executed by August Francis for Benita Francis dated 10 February 1983 is binding upon August Francis and that judgment be entered herein in favor of Benita Francis

and against August Francis for $22,857.00 and for $401.00 per month for each month after February, 1989.

Judgment read, rendered and signed this 13th day of February, 1989.

MAX N. TOBIAS, JR.
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DIVISION 1
DRS-2

BENITA FRANCIS

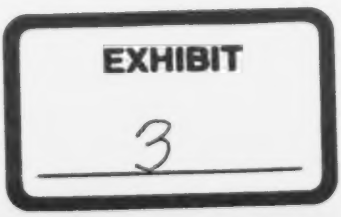
VERSUS

AUGUST FRANCIS

REASONS FOR JUDGMENT

Although this Court felt that the Veteran's Guardianship Act (R.S. 29:351 et seq.) precluded a finding by this Court of competence of August Francis, the Court of Appeal has concluded otherwise and effectively has directed this Court to hold an evidentiary hearing regarding Mr. Francis's capacity (competence) to assign a part of his disability benefit to Mrs. Francis.

After a trial on 4 November 1988, this Court concluded that Mr. Francis had contracting capacity and was competent to execute the 10 February 1983 affidavit assigning benefits to Mrs. Francis.



On 20 December 1988 after a 16 December 1988 hearing, this Court granted a new trial to hear the testimony of J. Browne LaRose, Esq., Mr. Francis's attorney during his divorce proceeding and the notary public on the subject affidavit.

On 3 February 1989, this Court heard Mr. LaRose's testimony. Recognizing that Mr. LaRose's testimony has thee potential to be self-serving, the Court finds that it is of limited probative value insofar as ascertaining Mr. Francis wishes in February 1983. The Court was impressed with Mr. LaRose's testimony that Mr. Francis was willing and wanted Mrs. Francis to continue to receive the $401.00 per month out of his disability benefits for so long as he continued to receive them.

Civil Code Article 1925 is not applicable here. Mr. Francis was under a form of limited interdiction. He was not deprived of reason at the time of executing the affidavit. Mrs. Francis and her attorney did not know as a

matter of fact whether Mr. Francis was deprived of reason on 10 February 1983 for Mr. and Mrs. Francis has been living apart for approximately 10 years at that time. And by implication, the Court of Appeal has considered and partially rejected the applicability of C.C. Art. 1925 by its 12 July 1988 judgment. That is, if C.C. Art. 1925 were an absolute bar to Mrs. Francis's recovery in this case, then Mrs. Francis as curatrix pursuant to R.S. 29:351 et seq. would have known of should have known by operation of law that Mr. Francis was without reason. The Court of Appeal has effectively determined that Mrs. Francis and her attorney did not know Mr. Francis's mental capacity on 10 February 1983.

Of the four tests in Higgins v. Spencer, 531 So. 2d 768, the Court concludes that Mr. Francis did on 10 February 1983 have the capacity to contract and give his consent freely for a lawful purpose of an object certain.

Judgment will again be entered for Mrs. Francis.

MAX N. TOBIAS, JR.
JUDGE

13th February 1989.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DRS-TWO

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

J U D G M E N T

The "Motion for New Trial" filed herein by August Francis on November 15, 1988, came for hearing on December 16, 1988.

PRESENT: Phillip P. Spencer,
Attorney for August Francis,
Mover-in-Rule;

Leon Cambon of the
Loyola Law Clinic,
Attorney for Benita Francis,
Defendant-in-Rule;

WHEN, after hearing the argument of counsel and considering the law and the evidence adduced, the "Motion for New Trial" will be made absolute, and accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that a new trial herein is granted limited to hearing

the testimony of J. Browne LaRose, the former attorney for August Francis, and this Court will issue its own subpoena for J. Browne LaRose to appear and give testimony on Friday, February 3, 1989, at 2:00 p.m.

JUDGMENT, READ, RENDERED AND SIGNED at New Orleans, Louisiana, on this 20th day of December, 1988.

MAX N. TOBIAS, JR.
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DIVISION "L"

BENITA FRANCIS

VERSUS

AUGUST FRANCIS

JUDGMENT

This matter came for trial on 4 November 1988.

PRESENT: Counsel for the parties

For the written reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the affidavit executed by August Francis for Benita Francis dated 10 February 1983 is binding upon August Francis and that judgment be entered herein in favor of Benita Francis and against August Francis for $21,654.00 and for $401.00 per month for each month after November 1988.

Judgment, read, rendered, and signed this 8th day of November, 1988.

MAX N. TOBIAS, JR.
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 86-18743 DIVISION "L"

BENITA FRANCIS

VERSUS

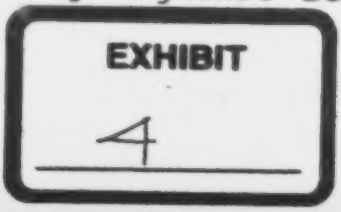
AUGUST FRANCIS

REASONS FOR JUDGMENT

This case is on remand from the Court of Appeal for determination of whether August Francis ("August") was competent on 10 February 1983 to execute an affidavit before a notary public, his attorney, agreeing to pay $401.00 per month to Benita Francis ("Benita").

Benita and August were married in 1957 and separated in 1972. For the next 10 years they did not communicate.

In 1983, August, on his way from visiting his psychiatrist at the V.A. Hospital, stopped in the law offices of J. Browne LaRose, Esq. and employed LaRose to represent him in divorce proceedings against Benita. LaRose



filed suit on August's behalf against Benita on the ground of living separate and apart for in excess of one year. Benita received service and delivered the petition and citation to Robert Landry, Esq. Landry contacted LaRose. Landry sought on behalf of Benita the continued payment of a portion of August's disability pension from the U.S. Government. An affidavit was drawn by LaRose, signed by August, notarized by LaRose, and transmitted to Landry to commemorate the agreement. The judgment of divorce was entered by default in late February 1983 and was uncontested. Benita did not attend the court proceeding.

August has been on total disability pension since 1945 from the U.S. Government relating to a military related mental illness. In April 1966, August was interdicted pursuant to R.S. 29:351 et seq. and Benita was appointed his curatrix.

August asserts that he did not know what he signed on 10 February 1983 and would not have

signed the affidavit on that day if he had known what it was. Mr. LaRose has not testified in these proceedings.

It is well settled law that even an interdict can have a lucid interval sufficient for the purpose of executing a testament. Circumstantial evidence tends to indicate that on 10 February 1983 August was lucid. This includes, among other items the following: he employed a lawyer without the assistance of another to represent him in a divorce proceeding a few days prior to the execution of the 10 February 1983 affidavit; he signed the affidavit prepared by his attorney, his agent, in the divorce proceeding; the fault issue was not litigated at the time of the divorce which tends to indicate that in exchange for not litigating fault, the pension would continue to go to Benita as a substitute for alimony; the affidavit was notarized by a notary public who is deemed by law to have acted properly and who apparently felt August was competent at the time; August participated

in the divorce proceeding with live "in-court" testimony in late February 1983; August immediately thereafter was involved in the acquisition of a home and signed an act of sale; the medications that August was prescribed which he took regularly were designed to allow him to function normally.

Although this Court originally found that R.S. 29:351 et seq. precluded a conclusion of competency and capacity when read in conjunction with C.C. Art. 402, the Court of Appeal has concluded otherwise. Such is the law of the case. C.C. art. 402 applies a different standard of capacity to interdicts than does R.S. 29:351 et seq. Therefore, August's acts and actions cannot be presumed invalid.

For these reasons among others, the Court concludes August's execution of the affidavit on 10 February 1983 was valid and constitutes a binding contract between him and Benita. Benita gave up contesting the divorce (and implicitly the fault issue at that time) in

exchange for the continued receipt of a part of August's pension.

Although argument is properly made than as a matter of law Benita had no right to participate in August's disability pension, he is allowed by law to contractually allocate all or part of the pension to a third person. This he did.

Accordingly, August is obligated to pay Benita $401.00 per month commencing June 1984, as prayed.

No prayer was made for interest and it cannot be taxed since the $401.00 monthly payment is contractual, not alimony. Further R.S. 46:236.3 is not applicable since the monthly payment is not alimony.

Judgment will be entered accordingly.

MAX N. TOBIAS, JR.
JUDGE

8 November 1988.

COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1292

BENITA FRANCIS
PLAINTIFF-APPELLEE

VERSUS
AUGUST FRANCIS
DEFENDANT-APPELLANT

On Appeal from the Civil District Court
for the Parish of Orleans, State of Louisiana
No. 86-18753 Division "L"
The Honorable Max N. Tobias, Jr., Judge

Exception of No Cause of Action on behalf
of August Francis, Defendant-Appellant

MARC H. MORIAL, A PROFESSIONAL
LAW CORPORATION

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ROSLYN G. TAYLOR, #20013
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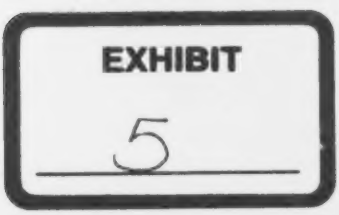
ATTORNEY FOR THE APPELLANT



COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA-89-1292

BENITA FRANCIS

PLAINTIFF-APPELLEE

VERSUS

AUGUST FRANCIS

DEFENDANT-APPELLANT

EXCEPTION OF NO CAUSE OF ACTION

NOW INTO COURT, through undersigned counsel comes defendant-appellant, August Francis, who objects to petition of Benita Francis on the grounds that it fails to state a cause of action against the defendant for the following reasons:

I.

Mr. Francis executed an affidavit in which he assigned a portion of his veterans

disability benefits to Mrs. Francis in an allegedly valid contract.

II.

Title 38 U.S.C. Section 3101 exempts the payment of disability benefits of Veterans from the claim of creditors.

III.

Under these circumstances, Federal law prohibits Mrs. Francis from collecting on the alleged pre-divorce contract for a portion of disability payments of her former husband.

WHEREFORE, defendant-appellant, August Francis, prays that his exception of no cause of action be maintained and that the petition of Benita Francis be dismissed with prejudice at plaintiff-appellee costs.

Respectfully Submitted:
MARC H. MORIAL
A PROFESSIONAL LAW CORPORATION

MARC H. MORIAL, #8452
ROSLYN G. TAYLOR, #20013
1610 ONE POYDRAS PLAZA
639 LOYOLA AVENUE
NEW ORLEANS, LA 70113
(504) 588-9171

COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA-89-1292

BENITA FRANCIS

PLAINTIFF-APPELLEE

VERSUS

AUGUST FRANCIS

DEFENDANT-APPELLANT

BRIEF IN SUPPORT OF
EXCEPTION OF NO CAUSE OF ACTION

STATEMENT OF THE CASE:

On February 10, 1983, August Francis executed an affidavit to assign a portion of his veterans disability pension to Benita Francis in an allegedly valid pre-divorce contract. Subsequent thereto, Mr. Francis

obtained a divorce default on February 23, 1983. In June, 1984 the Veterans Administration stopped the disability payments to Mrs. Francis. Mrs. Francis filed suit for support on October 16, 1986, seeking to enforce the affidavit or alternatively to obtain alimony.

On September 2, 1987, the case was litigated on the merits, and the trial court found for Mrs. Francis. On appeal, counsel for both parties stipulated that alimony was denied by judgment rendered February 17, 1980, and that time for appeal had expired. This honorable court reversed the judgment below and remanded the case for further proceedings.

Upon remand, the trial court found for Mrs. Francis in a judgment rendered on November 8, 1988. A new trial was granted, and again the court rendered a judgment in favor of Mrs. Francis. Mr. Francis now appeals this final decision of the trial court.

The issue before this court is whether the affidavit executed by Mr. Francis on February

10, 1983 constitutes a valid and enforceable contract.

LAW AND ARGUMENT

An Exception for No Cause of Action can be filed in any stage of these proceedings, and when it is filed, plaintiff does not acquire rights which it did not previously have. Ross v. Justice, 229 So.2d 756 (La. App. 3d Cir. 1969). This exception concedes, for purposes of the trial of the exception, truth and correctness of the facts as pleaded. Meche v. Arceneaux, 467 So. 89 (La. App. 3d Cir. 1984). Most importantly, an Exception of No Cause of Action may be sustained when plaintiff is neither entitled to judgment in any amount nor states a cause of action or any ground whatsoever under the facts alleged. McKey v. Dow Chemical Company, Inc. 295 So.2d 516 (La. App. 1st Cir. 1974). Thus, assuming the correctness of truthfulness the facts as pleaded by Mrs. Francis with respect to the validity of the affidavit executed by her former spouse, Mrs. Francis is not entitled to

any remedy because her claim is unenforceable.

Under Federal law, the disability benefits at issue here are non-assignable. Title 38 U.S.C. Section 3101 provides in pertinent part that "payments of benefits due, which become due under any law administered under the Veterans Administration shall not be assignable except to the extent authorized by law..." The provisions of this section are designed exempt veterans disability benefits from the claim of creditors. State ex-rel . Eastern State Hospital v. Beard, 600 P.2d 324 (Okl. 1979). Congress intended that such benefits should be used solely for disabled veterans, and the diversion of such payments in conflict with the exemption provision of this statute. Ex-parte Johnson, 591 S.W. 2d 453 (Tx. 1979); See also Inzinnia v. Inzinnia, 456 So.2d 691 (La. App. 5th Cir. 1984) (holding that pursuant to 10 U.S.C.A. Section 1408 (a) (1), former wife was not entitled to former husband's military disability pension).

The United States Supreme Court has held

that Section 3101 should be liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof. Porter v. Aetna Casualty and Surety Company, 370 U.S. 159, 82 S.Ct. 1231 (1962). Under the Johnson analysis, to order Mr. Francis to pay his ex-wife a portion of his disability compensation or the monetarily equivalent, run contrary to the language and the purpose of section 3101 which exempts the funds of the legal process and is intended to insure that the benefits actually reach the intended beneficiary. Id. at 455.

The foregoing considered, the affidavit executed by Mr. Francis which assigned a portion of his disability compensation to Mrs. Francis is prohibited by Federal law. As such, Mrs. Francis creditor claim is unenforceable pursuant to Section 3101.

CONCLUSION

Appellant respectfully submits that according to 38 U.S.C. Section 3101, Mrs.

Francis has no remedy at law. Accordingly, appellant respectfully requests that the Exception of No Cause of Action be maintained.

Respectfully Submitted:

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COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA-89-1292

BENITA FRANCIS

Plaintiff-Appellee

VERSUS

AUGUST FRANCIS

Defendant-Appellant

On Appeal from the Civil District
Court for the Parish of Orleans, State of Louisiana

No. 86-18753, Division "L"
The Honorable Max N. Tobias, Jr., Judge

Respondent's brief on behalf of Benita Francis,
Plaintiff-Appellee

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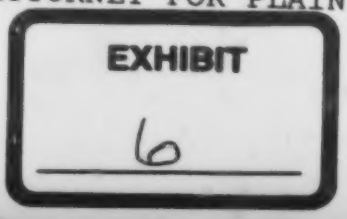

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COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1292

BENITA FRANCIS

Plaintiff-Appellee

VERSUS

AUGUST FRANCIS

Defendant-Appellant

On Appeal from the Civil District Court
for the Parish of Orleans, State of Louisiana
No. 86-18753, Division "L"
The Honorable Max N. Tobias, Jr., Judge

JURISDICTION

This is an appeal of a civil matter, tried before the Honorable Max N. Tobias, Jr, in the Civil District Court for the Parish of Orleans, State of Louisiana, and this court has jurisdiction hereof under and pursuant to

the provision of the Louisiana Constitution, Article V, Section 10 (A).

STATEMENT OF THE CASE

A. Statement of the Facts.

Benita and August Francis were married in 1957. On April 26, 1966, Mr. Francis interdicted pursuant to La.R.S. 29:351 et seq. or the Veterans Guardianship Act, and Benita Francis was appointed as his curatrix.

In 1966, pursuant to La.R.S. 29:351 or the Veterans Guardianship Act, Mrs. Francis filed a petition in district court to be appointed Mr. Francis' curatrix for the "sole purpose of filing an application for Veterans Service-Disabled Standard Insurance and paying premiums thereon". The April 22, 1966 judgment states:

> "Considering the foregoing petition, it is ordered, adjudged and decreed that:
>
> 1. August Francis be and he is hereby declared to be an incompetent beneficiary of the Veterans Administration pursuant to the provisions of La.R.S. 29:351 et seq.
>
> 2. Mrs. Benita P. Francis be and she is hereby appointed curatrix of the veteran for the sole purpose of applying for Veterans Service-Disabled Standard Insurance and

paying premiums thereon, upon taking the oath required by law.

3. Surety bond be and it is hereby waived in this case.

Mr. and Mrs. Francis physically separated in 1972 and did not communicate for ten (10) years.

In 1983, August Francis employed J. Browne LaRose, Esquire, to represent him in divorce proceedings against Benita Francis. Mr. LaRose filed suit on August's behalf against Benita on the ground of living separate and apart for an excess of one year. Benita Francis received service and delivered the citation and petition to Robert Landry, Esquire. Mr. Landry and Mr. LaRose negotiated whereby an affidavit was drawn up by Mr. LaRose and signed by August Francis, notarized by Mr. LaRose, and transmitted to Mr. Landry to complete the agreement. Judgment of divorce was entered by default in late February, 1983 and was uncontested.

The affidavit which Mr. Francis signed on

February 10, 1983 is the affidavit in question in this suit and reads as follows:

> "TO: BENITA FRANCIS
>
> "FROM: AUGUST FRANCIS
>
> "AFFIDAVIT"
>
> Before me, J. Browne LaRose, III, a notary public duly commissioned and qualified in and for the Parish of Orleans, in the presence of the witnesses hereinafter named and undersigned.
>
> Personally came and appeared, August Francis, a person of the full age of majority and a resident of and domiciled in the Parish of Orleans who declared unto me, notary, the following . . .
>
> That he has lived separately and apart from his wife, Benita Pert Francis, since 1972. That since that time, Benita Pert Francis has been receiving a portion of his disability benefits in the amount of $401.00 for her support. That in consideration of the fact that she has raised their children and is necessities circumstances, August Francis agrees that she shall continue to received this amount after the judgment of divorce in Civil District Court for the Parish of Orleans, suit no. 82-19357. Benita Pert Francis shall received this monthly payment for as long as August Francis receives his disability benefits."

This affidavit was signed by August Francis

and two witnesses and notarized by his attorney, Mr. LaRose. The affidavit was executed from August Francis to Benita Francis.

On February 23, 1983, there was a default proceeding held in which August Francis testified and a divorce from Benita was granted. The default issue was never litigated and Mr. Francis obtained the divorce through a default proceeding.

Furthermore, on February 25, 1983, approximately two weeks after execution of this affidavit, Mr. Francis and Mildred Parry Graham purchased a new home from Leonard J. Raymond and Carol A. Raymond.

Benita Francis failed to receive any support from the Veterans Administration in June of 1984. She filed suit on October 16, 1986 seeking to enforce the affidavit of February 10, 1983. Mr. Francis contended that he was mentally incompetent at the time he executed the February 10, 1983 contract.

B. Procedural History.

On September 2, 1987, this matter first came for trial before the Honorable Max N. Tobias, Jr., Judge. During this proceeding, it was discovered, to the surprise of all parties, that a curatorship was filed on April 26, 1966 appointing Mrs. Francis as a curatrix. The rule was further recessed and the trial judge requested briefs to determine whether Mr. Francis was a full interdict at the time. On September 28, 1987, judgment was rendered by the trial judge declaring the affidavit null and void. In his reasons for judgment, the trial court stated upon examining the curator proceedings, the court found that

> a pre-divorce contract involves self dealing in behalf of Mrs. Francis. A curator cannot in his or personal capacity, or a representative for another person, make any contracts with the interdict. Thus, the contract, by its very nature, fails and is null as a matter of law and the petition must be dismissed.

Reasons for Judgment, September 27, 1987.

Mrs. Francis appealed this ruling and argued that the interdiction of Mr. Francis was a

limited interdiction under La. C.C. article 389.1. This Honorable Court determined that the appointment of a curator under the Veterans Guardianship Act did not constitute full interdiction. Accordingly, this Honorable Court reversed the judgment below and remanded the case for further proceedings to determine whether Mr. Francis was competent at the time he made the contract on February 10, 1983.

Upon remand, the case came again before Judge Tobias on November 4, 1988. The court heard testimony from Mr. and Mrs. Francis and from Mrs. Francis' attorney, Robert Landry. The trial judge reversed his earlier decision and held that the affidavit executed by Mr. Francis was binding. In his reasons for Judgment, the trial judge stated:

> "It is well settled law that even an interdict can have a lucid interval sufficient for the purpose of executing a testament. Circumstantial evidence tends to indicate that on 10 February 1983 August was lucid. This includes, among other items the following: he employed a lawyer without the assistance of another to represent him in a divorce proceeding in a few days

> prior to the execution of the 10 of February 1983 affidavit; he signed the affidavit prepared by his attorney, his agent, in the divorce proceeding; the fault issue was not litigated at the time of the divorce which tends to indicate that in exchange for not litigating fault, the pension would continue to go to Benita as a substitute for alimony; the affidavit was notarized by a notary public who is deemed by law to have acted properly and who apparently felt August was competent at the time; August participated in the divorce proceeding with live "in-court" testimony in late February 1983, August immediately thereafter was involved in the acquisition of a home and signed an act of sale; the medications that August was prescribed which he took regularly were designed to allow him to function normally."

On November 15, 1988, counsel for Mr. Francis filed a motion for new trial. The motion was granted for a limited purpose of hearing testimony from Mr. Francis' attorney, Mr. J. Browne LaRose. Again, the court rendered a judgment in favor of Mrs. Francis finding Mr. Francis to be competent at the time of the signing of the affidavit. Mr. Francis now appeals this final decision of the trial court.

LAW AND ARGUMENT

Response to Specification of Error No. 1.

A.

Appellant has failed to meet his burden of proving incapacity at the time of the contract and the trial judge's assessment of the evidence regarding capacity should not be disturbed on appeal.

The trial judge's decision and finding of fact should not be disturbed on appeal in regard to appellant's incapacity. Dr. Valle's expert testimony fails to sufficiently prove the appellant's capability at the time of the contract. The trial judge then heard testimony from Mr. and Mrs. Francis and their counsel at the time and reviewed such exhibits as the affidavit and act of sale. After listening and reviewing to this evidence as a whole, the court concluded that August Francis failed to carry his burden of proof regarding incapacity. Louisiana courts have held that

reasonable evaluations of credibility and reasonable emphasis of fact should not be disturbed upon review, even though the appellate court may feel of its own evaluation and inferences are reasonable. Rosell v. Esco, 549 So.2d 840 (La. 1989). Therefore, the appellant's argument is without merit.

1. The testimony of the plaintiff's own expert witness Dr. Hector Valle, does not sufficiently show that Mr. Francis was deprived of reason at the time of the contract.

Mr. Francis' own treating physician, Dr. Hector Valle, through his own testimony, showed that Mr. Francis, even though a chronic paranoid schizophrenic, was capable of lucid intervals. Dr. Valle discussed a number of medicines which were prescribed for Mr. Francis and doing so stated these medicines helped him to lead a pretty normal life:

Direct examination by Mr. Spencer.

Q. Now, as long as he is taking the medication, could he lead a pretty normal life?
A. Yes, so long as he takes the medication. I remember quite well any time that he was under stress for any reason he had a

tendency to compensate.
Q. Do these medicines effect his insight in any way?
A. No.
Q. How about his judgment?
A. Well, it improves the judgment sure...
Q. Was he pretty faithful in taking his medication?
A. One of my best patients.
Q. Did you see him often and regular?
A. Every month.
Q. Religiously.

(88-CA-0076, VOl. II, transcript page 35.)

Furthermore, Dr. Valle recommended on two occasions in this testimony that Mr. Francis consult with an attorney on his divorce matter. Dr. Valle states:

> "He was very anxious when he mentioned to me that he wanted to get a divorce, and I remembered that I told him to get the advice of an attorney because in my opinion, he was not in a condition to make decisions by himself." (88-CA-0076, Vol. II, transcript page 36.)

Obviously, Dr. Valle considered Mr. Francis to be competent enough to speak with an attorney regarding his divorce situation.

Dr. Valle does state that Mr. Francis' capacity to function was diminished tremendously at times. Dr. Valle further

testified that at times, Mr. Francis had suffered from delusions or hallucinations. Dr. Valle was asked under cross examination:

> Q. As long as he took him medication, could he (August Francis) negotiate and compromise with other people, enter into negotiations?
>
> A. I would say yes, but the fact that he could be taking medication does not, make you think he was totally capable. Taking the medication was only the stress. The whole thing seemed to disappear to the point that I think I read this morning one of my notes, which I mentioned that the need for him to be taking the medication, because otherwise he could end up back in the hospital...
>
> Q. Do you feel as though he needed to be hospitalized around February of 1983? . . .
>
> Q. Do you feel as though he need to be hospitalized at that point?
>
> A. I don't think. No, I don't think he needed hospitalization at that particular time.

(88-CA-0076, Vol. II, transcript page 40.)

Dr. Valle states that as long as Mr. Francis is taking the medication, he could lead a pretty normal life. He further states that Mr. Francis was very faithful in taking his

medication and one of his best patients. He further recommended at the time of February, 1983 that Mr. Francis consult with an attorney regarding his divorce. Dr. Valle further states that even though at times Mr. Francis suffers from delusions and hallucinations, he did not need to be hospitalized in early February, 1983.

Dr. Valle further states that Mr. Francis had diminished capacity at times. Under cross examination, Dr. Valle said:

> Q. Your honor - I mean Dr. Valle, as long as Mr. Francis took his medication, was he able to read and write, understand, function?
>
> A. He was stable. What I mean is he was not acting out in any way, but, of course, he was - his capacity to function was diminished tremendously <u>at times</u>. Emphasis added.

(88-CA-0076 Vol. II, transcript page 38.)

Dr. Valle's testimony shows that August Francis had diminished capacity at times. However, as long as he took his medication he was stable. The medical testimony of Dr. Valle failed to show that Mr. Francis was

incompetent at the time he contracted on February 10, 1983. The testimony only indicates Mr. Francis could have lucid intervals.

The trial court, in its reasons for judgment, stated that the medications that Mr. Francis was prescribed which he took regularly were designed to allow him to function normally. The trial court also realized that Mr. Francis could have a lucid interval. The trial court, after hearing Dr. Valle, was obviously unsure as to whether or not Mr. Francis was lucid at the time of the contract. The trial court then looked to the testimony of other witnesses and the introduction of other evidence.

Even though the fact finder may not lightly disregard this testimony of an expert, that testimony is not binding on the court; nevertheless, the record as a whole must furnish some rational basis for decision of fact finder. McCray v. Abraham 550 So.2d 244 (La.App. 4th Cir. 1989). Furthermore, while

uncontradicted expert testimony and facts may not be lightly disregarded by the judge, the testimony nevertheless is not binding on the court. Phillip Werlein, Ltd. v. Daniels 530 So.2d 722 (La. 4th Cir. 1989). Dr. Valle's testimony was uncontradicted expert testimony; however, it never stated that Mr. Francis was incompetent at the time he contracted on February 10, 1983. Dr. Valle's testimony left the question open for the trial court's decision of whether Mr. Francis was lucid at the time of the contract.

2. Mr. Francis' actions during and after the February 10, 1983 affidavit, indicate that he was lucid at the time of the contract.

On February 10, 1983, Mr. Francis employed the services of an attorney J. Browne LaRose. Secondly, Mr. Francis participated in live "in-court" testimony in the default proceeding against his former wife. Thirdly, Mr. Francis purchased a home with his new spouse on February 25, 1983. These actions of Mr. Francis indicate that he was sane at the time

of the contract.

August Francis employed an attorney and notary public J. Browne LaRose, to represent him in the divorce proceedings against Mrs. Francis. Furthermore, Mr. LaRose, his own attorney, prepared and notarized the affidavit of February 10, 1983 which was executed by Mr. Francis. In fact, Mr. LaRose's testimony indicates that Mr. Francis was willing and eager to sign the affidavit:

> "He said he wanted to do it. In fact, he seemed, you know, eager to do it, as I recall, and he didn't seem like there was any problem whatsoever. We had the affidavit executed, sent it to Mr. Landry and we procured his divorce. It happened pretty quickly. There was not a lot of soul searching or any thought involved, any deep thought involved in it. My impression from Mr. Francis was that this was what he wanted to do. It was always in his mind that he wanted it."

(89-CA-1292, Vol. II, transcript page 13.)

Mr. LaRose's testimony that within the handling of Mr. Francis' divorce, there was never any second thought or doubt or even worse any action of a person deprived of reason. Mr. LaRose, also as a notary public,

did not observe Mr. Francis to be incompetent.

Mr. Francis also participated in live "in-court" testimony shortly after signing the affidavit for the procurement of the judgment of divorce. There was never any question by Mr. LaRose or anyone during the live "in-court" testimony that Mr. Francis was suffering from hallucinations or delusions. He was able to successfully testify truthfully and competently in the default proceeding. He did not need the assistance of any medical physician in order to either consult his attorney or to testify. This live "in-court" testimony took place on February 23, 1983.

Finally, and most convincingly, on February 25, 1983, approximately two weeks after the execution of the affidavit and two days after testifying in open court, Mr. Francis contracted to purchase a new home with Mildred Parry Graham from Leonard J. Raymond and Carol A. Raymond. This home was purchased under a vendor's lien and states that August Francis was able to declare unto the notary that he

was married twice previously and once to Benita Francis and divorced. (89-CA-1292, Exhibits, Plaintiff Exhibit No. 2.) It again shows Mr. Francis' signature before another notary public, J. Bruce Naccari, on February 25, 1983.

Mr. Francis' actions seemed to be those of a limited interdict under La. C.C. Article 389.1.

He is negotiating, compromising and contracting with other people at the same time he executed the February 10, 1983 affidavit. Even though the laws of limited interdiction did not apply at the time, this Honorable Court has held that Mr. Francis' interdiction under the Veterans Guardianship Act was similar to that under La. C.C. 389.1 Francis v. Francis 529 So.2d 110 (4th Cir. 1988). The rights of limited interdict are as follows under La. C.C. 389.1:

> "The rights of a limited interdict shall be infringed in the least restrictive manner consistent with its incapacities. Judgment of limited interdiction shall not operate, deprive or incapacitate a person in any civil

> right, the right to contract or any right or benefit unless specifically set forth in the judgment." Emphasis added.

Mr. Francis' actions as a limited interdict should be strictly construed as one who does not want his right to contract diminished in any way.

Although Mr. Francis claimed to be incapacitated at the time of the signing of the contract, he remembers the contract and the circumstances surrounding the signing quite well. Mr. Francis was asked about the February 10, 1983 affidavit in the following manner:

> Q. Mr. Francis, do you know what this document is? Can you identify it?
>
> A. Actually, I did not know anything about this when I first signed it. My lawyer told me this is the only way I would be able to get a divorce, and that is the reason I signed it. Other than that, if I had had another attorney to explain this to me, I would not have never signed it, you understand?

(89-CA-1292, Vol. I, transcript page 18.)

Mr. Francis remembered his attorney's name

at the time of the execution of the agreement. (89-CA-1292, Vol. 1, transcript page 17.) Mr. Francis was further asked about the agreement and testified as to the following:

> Q. The judgment of divorce, do you understand that?
>
> A. What I wanted to get a divorce, get away from this lady. Now all of this on the paper, miss, I done explain it to you that this is what happened. The lawyer, if I had had a better lawyer, this would never had put me in this mess. I would not have never been here today. (89-CA-1292, Vol. I, transcript pages 19 and 20.)

Mr. Francis was obviously a person of sound mind at the time he contracted and furthermore, remembered the terms and conditions of the contract and his attorney's name. Furthermore, Mr. Francis states himself that if this matter would have been better explained to him by another attorney, he would never have signed this agreement. This indicated his sanity.

In Meadors v. Pacific International Petroleum, Inc., 449 So.2d 26 (La. App. 1st Cir. 1984), the court held that a lessor who

executed a oil, gas and mineral lease within a few days after he returned from the hospital and he was on medication designed to assist in sleeping, failed to establish he was mentally incompetent at the time of the lease. The court found Mr. Meadors testimony to be his most damaging. The court stated for a man who claimed that he was so incapacitated at the time of the lease was signed, he remembered nothing about the lease, it was surprising how well he remembered several detailed provisions of the lease. Id. page 30. This is similar to Mr. Francis' scenario. Mr. Francis remembered the divorce agreement, remembered his attorney's name and remembered being dissatisfied with the agreement. Mr. Francis was obviously dissatisfied with his own lawyer's representation and now wishes to have the contract annulled on his only legal ground, mental incapacity.

The trial judge's finding of fact from the record should not be disturbed on appeal. The defendant's own expert failed to carry the

heavy burden of showing his incapacity at the time of contract. Furthermore, Mr. Francis' own actions show a sane limited interdict who is contracting and dissatisfied with one of his agreements. He now wishes to have only that agreement invalidated on his mental capacity. The trial judge was able to assess Mr. Francis' credibility along with other witnesses and therefore, his decision should not be reversed.

B.

Even though she received funds from the Veterans Administration, Mrs. Francis was unaware of Mr. Francis' condition at the time of the execution of the affidavit in 1983.

Mrs. Francis was unaware of Mr. Francis' mental condition at the time of the 1983 affidavit. Mr. and Mrs. Francis have been physically separated for approximately ten (10) years from each other. During their marriage, there was never a full interdiction proceeding instituted by either August or Benita Francis. Finally, due to his own actions, Mr. Francis was not known at the time

of the execution of his affidavit within the community to be insane.

Since Mrs. Francis has been physically separated from Mr. Francis for a period of ten years prior to the signing of the affidavit, it would be unfair to state that she knew or should have known of Mr. Francis' condition at that time. It is true, however, that in April 1966, August was interdicted pursuant to La. R.S. 29:351 et seq. under the Veterans Guardianship Act and Benita was appointed as curatrix. However, this Honorable Court has held this to be a limited interdiction similar to that of the limited interdiction under La. C.C. article 389.1. In the Succession of Baltimore, 176 So.2d 684 (La. App. 1937), the court held where her husband was under curatorship for purposes of receiving compensation under the War Risk Insurance Act but had never been interdicted under the insanity statute, this curatorship did not render the husband incapable of contracting marriage. The curatorship established did not

supersede regular interdiction proceedings provided for in competent persons and was intended only as an expedient means for collecting and administering benefits accruing to disabled veterans. Id. This court should not hold that Mr. Francis' interdiction under the Veterans Guardianship Act which could be used for expedient means of collecting and administering benefits to Mr. Francis back in 1966 showed that Mrs. Francis knew of Mr. Francis' mental condition at the time of the execution of the affidavit in 1983.

Secondly, Mr. Francis was never fully interdicted under Louisiana law. During their marriage, there was never a formal interdictions proceeding or evidentiary hearing discussing Mr. Francis' mental condition. Mrs. Francis was not aware of Mr. Francis' diminished capacity to contract. Mrs. Francis indicated only that she was aware that he took medicine for his nerves. (89-Ca-1292, Vol. I, transcript page 10.) He further testified that he was able to hold jobs during

the marriage. Id. Mrs. Francis may only have been aware at worse that Mr. Francis was a limited interdict under La. C.C. article 389.1. This limited interdiction did not in any way interfere with his right to contract. Therefore, Mrs. Francis was unaware of Mr. Francis' diminished capacity in any way to contract.

Finally, Mr. Francis' own actions in February, 1983 did not indicate to anyone else that he was incapacitated at the time. In fact, his actions of purchasing a house and testifying in open court indicated to the community that he was sane. Furthermore, his hiring of counsel, J. Browne LaRose, and his dealings with Mr. LaRose indicate no action of insanity. Therefore, Mrs. Francis could not be held to be aware of any diminished capacity of Mr. Francis at the time of the contract.

Response to Specification of Error No. 2.

C.

The affidavit or alimony contract executed by Mr. Francis is valid as a matter of law and is not an assignment of Veterans Administration benefits.

The appellant states that the contract is not perfected because it does not have a lawful purpose. The appellant states that the cause of the obligation is unlawful because it provides for disability benefits of the Veterans Administration to be assigned or apportioned to Mrs. Francis. Appellee, Mrs. Francis, states that the contract is in no way an assignment. Mrs. Francis states that this is a unilateral alimony contract executed by Mr. Francis. The heading of the contract further states that it involves only two parties, Mr. and Mrs. Francis. Secondly, the contract or affidavit in no way indicates the Veterans Administration to pay Mrs. Francis any portion of any benefits. Finally, the mentioning of disability benefits is only done for a referral as a reference to the amount.

The importance of the affidavit is as follows:

> ". . . that he has lived separately and apart from his wife, Benita Pert Francis, since 1972. That since that time Benita Pert Francis has been

> receiving a portion of his disability benefits in the amount of $401.00 for her support. That in consideration of the fact that she has raised their children and is in necessity of circumstances, August Francis agrees that she shall continue to receive this amount after the judgment of divorce in Civil District Court for the Parish of Orleans, suit number 82-19357. Benita Pert Francis shall receive this monthly payment for as long as August Francis receives his disability benefits" (89-CA-1292, Exhibits, Plaintiff Exhibit 1.)

Mrs. Francis is not participating in Mr. Francis' disability pension. This is a unilateral alimony contract executed by Mr. Francis. It involves two parties, Mr. and Mrs. Francis. It in no way dictates the Veterans Administration to pay Benita Francis any payments. The disability payments are only used to refer to the amount of $401.00 which Mr. Francis has decided to contractually allocate to Mrs. Francis. It orders Mr. Francis to pay the monthly payment of $401.00 to Mrs. Francis as part of an alimony agreement. Therefore, there would be no conflict with federal law to enforce by

judgment the paying of $401.00 to Mrs. Francis by Mr. Francis. The trial judge in his ruling did not in any way order the Veterans Administration to pay a portion of the veterans benefits to Mrs. Francis. Therefore, this contract is not in any way against federal law or public policy and is valid as a matter of law and the appellant's exception of no cause of action is also without merit.

D.

The contract does have valid cause and is enforceable as an alimony contract.

The affidavit of February 10, 1983 does have valid legal cause and consideration. The "cause" of the contract means the motive for making the contract. First Federal Savings and Loans of Natchitoches v. American Bank and Trust Co. of Coushatta, 461 So.2d 341 (La. App. 2nd Cir. 1984). This was the law under the old Civil Code article 1896 which was revised in 1984. Under the new article, Civil Code 1967 cause is the reason why a party obligates himself.

The contract of February 10, 1983 has a valid cause because it avoids the need for an alimony hearing. It allows Mr. Francis to take an uncontested divorce without the litigating of fault. It avoids Mr. Francis from further legal costs and attorney's fees regarding the hearing. The legal cause or consideration of this contract was to avoid a hearing regarding alimony and therefore, this affidavit did not lack a valid cause.

Furthermore, an affidavit in itself, Mr. Francis states that in consideration of the fact that Mrs. Francis had raised the children and is in necessity of circumstances, she shall receive the amount of $401.00 per month. Mr. Francis even believes that she should have this amount because of the fact that she has done what was mentioned in the affidavit. In Elam v. Shushan, 17 So.2d 713 (La. 1944), the court held gratitude for benefits received or the hope of future favors as sufficient foundation for a contract. Mr. Francis obviously believed that since his wife has

raised the children as in need, this is a sufficient monetary amount for her to be awarded.

For these reasons mentioned above, appellant's argument is without merit.

CONCLUSION

The trial judge's finding of fact and decision regarding Mr. Francis' capacity should not be disturbed on appeal. Mr. Francis' own treating physician, Dr. Hector Valle, failed to sufficiently show that Mr. Francis was incapacitated at the time of the signing of the contract. Furthermore, Mr. Francis' actions during and after the February 10, 1983 affidavit indicate that he was lucid at the time of the signing of the contract. At first, he employed the services of an attorney, J. Browne LaRose. Secondly, Mr. Francis participated in live in-court testimony in the default proceeding against his former wife. Thirdly, Mr. Francis purchased a home with his now new spouse on February 25, 1983. Mr. Francis was obviously

a person of sound mind at the time of the contract and is unhappy with the terms and conditions of the February 10, 1983 affidavit.

Mrs. Francis was unaware of Mr. Francis' mental condition at the time of the February 10, 1983 affidavit. Mrs. Francis had been physically separated for approximately ten (10) years from Mr. Francis. Also, the affidavit is a valid unilateral alimony contract under Louisiana law and is not an assignment of Veterans Administration benefits. It does not violate federal law since it contractually provides for Mr. Francis to pay $401.00 per month and in no way assigns the Veterans Administration to send these benefits to Mrs. Francis. Finally, the contract does have valid consideration and cause by avoiding Mr. Francis the need for an alimony hearing.

Mr. Francis only wishes to have the agreement of February 10, 1983 set aside since he is unhappy with its terms and conditions. For these reasons mentioned above, the court

should sustain the trial court's decision.

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COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1292

BENITA FRANCIS

PLAINTIFF-APPELLEE

VERSUS

AUGUST FRANCIS

DEFENDANT-APPELLANT

On Appeal from the Civil District Court for
the Parish of Orleans, State of Louisiana
No. 86-18753 Division "L"
The Honorable Max N. Tobias, Jr. Judge

Petitioners brief on behalf of August Francis,
Defendant-Appellant

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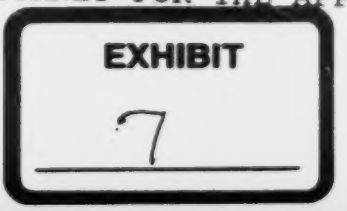

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COURT OF APPEAL

FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-1292

BENITA FRANCIS
PLAINTIFF-APPELLEE

VERSUS

AUGUST FRANCIS
DEFENDANT-APPELLANT

Appeal from the Civil District Court for
the Parish of Orleans, State of Louisiana
No. 86-18743, Division "L"
the Honorable Max N. Tobias, Jr.,
Judge

JURISDICTION

This is an appeal of a civil matter, tried before the Honorable Max N. Tobias, Jr. in the Civil District Court for the Parish of Orleans, and this court has jurisdiction hereof under and pursuant to the provisions of the Louisiana Constitution, Article V, Section

10 (A).

STATEMENT OF THE CASE

A. Statement of the Facts.

In 1945, August Francis was discharged from the military as a mentally incompetent commonly known as "Section Eight Discharge". He received compensation from the Veterans Administration as one hundred percent (100%) disabled from his service connected condition from 1945 through the present date. He is not considered capable of employment as stated on a letter from the Veterans Administration dated October 30, 1986, Exhibit D-3.

Benita and August Francis were married in 1957. On April 22, 1966, Mr. Francis was interdicted pursuant to La.R.S. 29:351 et seq, and Benita Francis was appointed as his curatrix. Mr. Francis left the marital home in 1972 and during the ten years thereafter they did not communicate.

In 1983, Mr. Francis commenced divorce proceedings against Mrs. Francis. His psychiatrist, Dr. Hector Valle, testified that

he told Mr. Francis to get the advice of an attorney because "he was not in a condition to make decisions by himself." (Proceedings September 2, 1987, tr. p. 36). After filing suit, August Francis obtained an uncontested judgment of divorce by default on February 23, 1983. Benita Francis did not attend the court proceedings.

Prior to the judgment of Divorce, Benita Francis retained Robert Landry, Esq. to negotiate a contract with August Francis and his attorney J. Browne LaRose, Esq., for the purposes of obtaining a portion of your petitioner's disability pension with the United States government. On February 10, 1983, Mr. Francis executed an affidavit which assigned a portion of his Veterans disability pension to Mrs. Francis. However, the Veterans Administration stopped payment to the former spouse in June, 1984. Mrs. Francis filed suit for support on October 16, 1986, seeking to enforce the affidavit or alternatively to obtain alimony.

B. Disposition of the Case by the Court below.

The matter first came to trial on September 2, 1987. The court heard the testimony of Mr. Francis and his treating psychiatrist, Dr. Hector Valle; then the trial judge recessed for the purpose of obtaining briefs. On September 28, 1987, the trial court rendered a judgment in favor of Mr. Francis and declared the affidavit was null, void and unenforceable. The petition for support was dismissed. In his reasons for judgment, the trial court stated that upon examining the curator proceedings, the court found that

> a pre-divorce contract involves self dealing in behalf of Mrs. Francis. A curator cannot in his or personal capacity, or as a representative for another person, make any contracts with the interdict. Thus, the contract, by its very nature, fails and is null as a matter of law and the petition must be dismissed.

Reasons for Judgment, September 27, 1987.

Mrs. Francis appealed this ruling and argued that the interdiction of Mr. Francis was a limited interdiction and that Louisiana law did not preclude the enforcement of the

affidavit. Additionally, counsel for both parties stipulated that alimony was denied by judgment rendered February 17, 1980, and time for appeal had expired.

This Honorable Court determined that the appointment of a curator under the Veterans Guardianship Act did not constitute a full interdiction. Accordingly, this court ruled that Mr. Francis was not prohibited from contracting with Mrs. Francis to assign to her a portion of his benefits since the powers of curatorship were limited to those listed in the judgment of appointment.

Although Mr. Francis argued that the judgment should be upheld based on the evidence presented at trial, Mrs. Francis claimed that she was not given an opportunity to rebut. Because the record was not complete, this Honorable Court reversed the judgment below and remanded the case for further proceedings.

Upon remand, the case came again before Judge Tobias on November 4, 1988, and Mr.

Francis testified that he did not know what he signed on February 10, 1983, and would not have signed the affidavit had he known what it was. See Reasons for Judgment, 8 November 1988. Additional testimony was given by Mrs. Francis and her attorney Robert Landry. Mr. LaRose did not testify in that proceeding.

The trial judge reversed his earlier decision and held that the affidavit executed by Mr. Francis was binding. In his reasons for Judgment, the trial judge stated

> It is well settled law that even an interdict can have a lucid interval sufficient for the purpose of executing a testament. Circumstantial evidence tends to indicate that on 10 February 1983 August was lucid. This includes, among other items the following: he employed a lawyer without the assistance of another to represent him in a divorce proceeding a few days prior to the execution of the 10 February 1983 affidavit; he signed the affidavit prepared by his attorney, his agent, in the divorce proceeding; the fault issue was not litigated at the time of the divorce which tends to indicate that in exchange for not litigating fault, the pension would continue to go to Benita as a substitute for alimony; the affidavit was notarized by a notary public who is deemed by law to have acted properly and who apparently felt August was competent at the time; August participated in the divorce proceeding with live "in-court" testimony in late February 1983; August immediately thereafter was involved

in the acquisition of a home and signed an act of sale; the medications that August was prescribed which he took regularly were designed to allow him to function normally.

The court determined that Mrs. Francis gave up contesting the divorce and implicitly the fault issue in exchange for continued receipt of a portion of the disability pension. Asserting that Mr. Francis is allowed by law to contractually allocate all or part of the pension to a third person, the court concluded that the affidavit was valid and constituted a binding contract between Mr. and Mrs. Francis. Id.

On November 15, 1988, counsel for Mr. Francis filed a motion for new trial. The motion was granted for the limited purpose of hearing testimony of Mr. LaRose. Again, the court rendered a judgment in favor of Mrs. Francis. Relying on the early testimony of Mr. LaRose, Judge Tobias held that Mr. Francis was not deprived of reason at the time the affidavit was executed. Additionally, the trial judge determined that neither Mrs.

Francis, nor her attorney knew, as a matter of fact whether Mr. Francis was deprived of reason at the time. The court further stated that La. C.C. Art. 1925 did not apply in this matter. Judge Tobias concluded that on February 10, 1983, Mr. Francis did not have the capacity to contract and gave his consent freely for a lawful purpose of an object certain. Reasons for Judgment dated February 13, 1989. Mr. Francis now appeals this final decision of the trial court.

SPECIFICATIONS OF ERRORS

1. The trial court erred in determining that Mr. Francis had capacity to contract on February 10, 1983.

2. The trial court erred in determining that the affidavit executed by Mr. Francis constituted a valid contract.

LAW AND ARGUMENT

In Louisiana, the law presumes capacity to contract. La. Civil Code Art. 1918 provides:

> All persons have capacity to contract, except an emancipated minor, interdicts and persons deprive of reason at the time of contracting.

Such exceptions must be shown quite

convincingly by the great weight of the evidence. First National Bank of Shreveport v. Williams 346 So.2d 257 (La. App. 3d Cir. 1977).

The manifest error standard of review is inappropriate in the case at bar. The manifest error rule of appellate review weight only to the trial court's actual findings. The findings of the trial court will not be taken as conclusive on the issue of the probative value of the testimony. Bariffe v. Ortiz 476 So.2d 371 (La. App. 4th Cir. 1985). Accordingly, in an evaluation of the sufficiency or preponderance of the evidence, the manifest error rule inapplicable. Id. Furthermore, in determining mental capacity, great weight must be given to the testimony of the attending physician. See Succession of Lafferanderie 84 So.2d 442 (La. 1955).

A. Appellant has met his burden of proving incapacity through the unrefuted testimony of his psychiatrist.

The record clearly establishes that Mr.

Francis was discharged from the military in 1945 as a mentally incompetent and had qualified for 100% disability payments. Mr. Francis has been receiving psychiatric treatment and medication at the V.A. Hospital in New Orleans for over seventeen years.

The evidence previously introduced in the trial court consisted of five exhibits as follows:

> Exhibit D-1, medical record of the patient August Francis from the Veterans Administration Medical Center for the period of February 1, 1982 through November 29, 1983;
>
> Exhibit D-2, letter from R.L. Stone, M.D. to Veterans Administration contact office dated January 4, 1973;
>
> Exhibit D-3, memorandum "To Whom it May Concern" from J.P. Clark, Veterans Services Officer dated October 30, 1986;
>
> Exhibit D-4, medical record of patient August Francis from the Veterans Administration Medical Center for the period June 12, 1980 through May 29, 1987;
>
> Exhibit D-5, entire record and proceedings No. 447-936 of the Civil District Court entitled Curatorship of August Francis.

In February of 1982, Mr. Francis was under the treatment and care of his psychiatrist,

Dr. Hector J. Valle. On September 2, 1987, Dr. Valle testified with respect to the condition of Mr. Francis in February of 1983. Dr. Valle testified that Mr. Francis' condition was diagnosed as chronic paranoid schizophrenia with marginal adjustments due to medications (Emphasis Added) (Exhibit D-4 complete report of Veterans Administration dated July 24, 1984, problem oriented progress notes dated September 5, 1982) 88 CA-0076 Vol. II, tr. p. 33). Dr. Valle further testified that Mr. Francis suffered delusions, distortions of reality. Dr. Valle stated that Mr. Francis had "delusions quite frequently." (88-CA-0076 Vol. II, tr. pp. 37, 39).

Dr. Valle further testified that although Mr. Francis was not acting out in anyway, "his capacity to function was diminished tremendously at times." (88-CA-0076, Vol. II, tr. p. 38). Dr. Valle stated that Mr. Francis was not in a condition to make decisions concerning a divorce by himself. (88-CA-0076, Vol. II, tr. p. 36).

On August 5, 1982, Dr. Valle prescribed "Thorazine 50 mgr one bid and II at hs #120; Stelazine 2 mgr one QID #120; Cogentin 2 mgr daily #30; Tylenol tablets II PRN pain #50; and Mylanta Tsp one P/C and PRN #5 bottles" for Mr. Francis. The foregoing is set forth in the medical record from the Veterans Administration, Exhibit D-1. Moreover, Exhibit D-1 dated February 4, 1983 states "PLAN: to avoid hospitalization by keeping him on drug therapy. Will continue with 1) Thorazine; 2) Stelazine; 3) Cogentin; 4) Tylenol; 5) Mylanta". Id. (Emphasis Added).

The fact that Mr. Francis was taking medications did not make him totally capable according to Dr. Valle. (88-CA-0076, Vol. II, tr. p. 39). Dr. Valle testified that as long as Mr. Francis took his medication, "he was not acting out in any way, but, of course, he was -- his capacity to function was diminished tremendously at times." (88-CA-0076 Vol. II, tr. p. 38). Additionally, Dr. Valle stated that the fact that Mr. Francis took medication

did not make him totally capable. (88-CA-0076 Vol. II, tr. p. 39). When asked if his patient's judgment could have been affected in any contracts that he may have made, Dr. Valle responded "absolutely". (88-CA-0076, Vol. II, tr. p. 40).

Dr. Valle also testified that Mr. Francis was very self-conscious about his disability and about other people's opinion of him. Mr. Francis believed that people were making fun of him; he also believed that his wife wanted to tell everyone that he was a mental case. (88-CA-0076 Vol. II, tr. pp. 37,38). Dr. Valle further testified that Mr. Francis was constantly fearful of psychiatric in-patient services on the ninth floor at the Veterans Administration Hospital." I don't recall exactly the date, but sometimes I thought he may need to be hospitalized, but Mr. Francis was so scared of the ninth floor in-patient service, he was so scared, he said "No, please don't put me in the hospital.: (88-CA-0076 Vol. II. tr. pp. 39-40).

The medical testimony presented by Dr. Valle on behalf of Mr. Francis is unrefuted. Mrs. Francis has not put on medical evidence to rebut the testimony of Dr. Valle. The trial court relied on the lay testimony of Mr. LaRose in determining whether Mr. Francis was the deprived of reason on February 10, 1983.

Hence, the court erred in attributing any weight to the lay testimony presented. Louisiana jurisprudence have held that where there is no conflict in expert testimony, lay testimony will not be taken into consideration. Redmond v. Quachita Coca Cola Bottling Company 76 So.2d 553 (La. App. 2d Cir. 1954). The courts have stated that medical testimony should be conflicting before any significant value is attributed to lay testimony about an individual medical condition. O'Quin v. Southern Pipe and Supply Company 216 So.2d 320 (La. App. 3d Cir. 1968); See also Jackson v. United States Fidelity and Guaranty Company 382 So.2d 223 (La. App. 3d Cir. 1980) (holding that uncontradicted

testimony of the psychiatrist concerning his diagnosis should have been given greater weight). Additionally, it is well settle that testimony of the attending physician should be given great weight. See generally Johnson v. R.P. Farnsworth and Company 186 So.2d 405 (La. App. 1st Cir. 1966).

In Interdiction of Burns 486 So.2d 977 (La. App. 1st Cir. 1986), plaintiff filed suit to rescind a pre-interdiction contract. The trial court found that the plaintiff did not have the proper mental capacity to contract. The court's decision was based on the deposition of an expert in the field of psychiatry and the failure of the defendants to produce medical testimony. Id. at 979. The appellate court affirmed that decision. The Burns analysis is applicable to the instant case. Here, the trial court erred by failing to give the unrefuted and uncontradicted medical testimony of Mr. Francis' treating physician, Dr. Valle, great weight. In fact, under the Redmond rule, the

lay testimony of Mr. LaRose should not have been taken into consideration at all. Thus, under Redmond and Burns, Mr. Francis has shown quite convincingly and by great weight of the evidence that he lacked capacity to execute a contract on February 10, 1983. Accordingly, pursuant to the Louisiana Civil Code Article 1918, Mr. Francis was deprived of reason at the time of the contracting and thus did not have capacity to contract.

B. Mrs. Francis knew or should have known that Mr. Francis was mentally disabled.

Louisiana Civil Code Article 1925 provides as follows:

> A noninterdicted person who was deprived at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity.

On April 21, 1966, Mrs. Benita Francis filed a Petition for the Interdiction of Mr. Francis pursuant to La. R.S. 29:351 et seq. A certificate of incompetency executed by the Chief Attorney of Veterans Administration was

attached to that petition. This document certified that Mr. Francis had been rated incompetent by the Veterans Administration on an examination dated July 16, 1959. (See 88-Ca-0076, Supplemental Transcript).

On October 16, 1968, Mrs. Francis filed a petition seeking support from Mr. Francis. Paragraph VI of said petition states:

> "Upon information and belief, defendant (Mr. Francis) is mentally disabled and continues to receive Veterans Administration disability payments." (88-CA-0076 Vol. I. Petition for Support)."

Moreover, in proceedings held on February 12, 1988, Mrs. Francis admitted that Mr. Francis was hospitalized because of his mental condition. (89-CA-1292 Vol. II tr. p. 20). Mrs. Francis further admitted she went to the social worker at the Veterans Administration. (89-CA-1292, Vol. I, tr. p. 10). Most tellingly, Mrs. Francis admitted that Mr. Francis received a check for 100% disability (the subject of this litigation because of his mental condition). (89-CA-1291, Vol. II tr. pp. 17-18). Accordingly, Mrs. Benita Francis

knew or should have known that Mr. Francis suffered a 100% mental disability. Thus under Louisiana Civil Code Articles 402, 1918, and 1925, a contract in which Mr. Francis assigned a portion of his Veterans disability pension to Mrs. Francis is null and void because Mr. Francis lacked capacity to contract, and Mrs. Francis knew or should have known of his incapacity.

Furthermore, in the case of Fidelity Financial Services, Inc. v. McCoy, 392 So.2d. 118 (La. App. 1st Cir. 1980), the Court of Appeal of Louisiana affirmed the district court's decision in finding that the defendant lacked mental capacity to contract, that his condition was common knowledge in the community, and that the incapacity existed at the time of the contract. In the case of Fidelity Financial Services, Mr. McCoy was discharged from the U.S. Army in 1960 because of his mental condition, and he has been receiving psychiatric treatment and medication at the V.A. hospitals in New Orleans and

Gulfport ever since. His wife, son, and two other persons from the community testified that they knew and that it was commonly known in the communities that defendant was mentally incapable of handling his affairs. Mr. McCoy had later been interdicted. Mr. McCoy entered into a contract securing a loan for the purchase of an automobile, which was the subject of the suit. The plaintiff's only witness testified that "Mr. McCoy appeared to be normal." Id. at 119. The court implies that the plaintiff had the burden of proof in establishing that the contract was made during lucid intervals in order to make any attempts to avoid defendants' defense of insanity. The Fidelity case is analogous to the case at bar. Both cases involve discharged veterans on 100% disability, unable to handle their own personal affairs, and commonly known throughout the community to be mentally incompetent. More Importantly, both Mr. McCoy and Mr. Francis were two incompetent individuals undergoing psychiatric treatment

and medication before, during, and after the making of the contracts in dispute; and lacking the full capacity to enter into any legally binding affair, although they both "appeared" to be normal.

In Fidelity, "the plaintiff failed to carry his burden of proof that the contract was made during a lucid interval." Id. at 119. Dr. Valle testified as to Mr. Francis having marginal adjustments due to his medication. Mr. Francis contends that Mrs. Francis failed to establish as a matter of fact that he freely bargained and mutually consented to a pre-divorce alimony contract during a time he experienced a lucid interval if indeed he experienced any marginal adjustment at that time at all. This court should render any doubts in favor of Mr. Francis and adopt the decision of the court in Fidelity by rescinding the alimony contract.

II. THE AFFIDAVIT EXECUTED BY MR. FRANCIS IS AN INVALID CONTRACT BECAUSE IT VIOLATES LOUISIANA LAW AS WELL AS

FEDERAL LAW.

There are four elements required for the confection of a valid contract:

1. The parties must have capacity to contract;
2. The contract must have a lawful purpose;
3. There must be certain object for the contract; and
4. The parties' mutual consent must be freely given. The document at issue in the instant litigation fails as a valid contract on all four points. First, Mr. Francis lacked capacity to contract, and Mrs. Francis knew that Mr. Francis was incompetent and deprived of reason at the time of contracting as stated above. Because Mr. Francis was incapacitated he was incapable of freely giving consent by operation of law. Second, the contract at issue does not have a lawful purpose. La Civil Code Art. 1968 defines unlawful cause as follows:

> The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

Furthermore, pursuant to La. Civil Code Art. 1894, obligations which are exempt from seizure are not subject to compensation. Under Federal law the disability benefits at issue here are non-assignable. The Veterans Administration letter dated October 30, 1986, to whom it may concern states:

> The Veterans Administration has no authority to apportion VA benefits to a divorced spouse per 38 U.S.C. 3107 and 101 (31). Title 38 U.S.C. 3101 defines a non-assignability and exempt status of Veterans Administration benefits.

Section 3101 provides in pertinent part that "payments of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent authorized by the law. . ." The provision of this section that payments of benefits under any law administered by the Veterans Administration shall be exempt from the claim of creditors is intended to protect the recipient of these benefits. State ex rel. Eastern State Hospital v. Beard, 600 p.2d 324 (Okl. 1979). Additionally, a Texas

court held that an award for divorced wife of 50% of her husband's anticipated future disability benefits from the Veterans Administration conflicted with the clear intent of Congress that such benefits should be solely for the use of disabled Veterans, and the diversion of future payments was in conflict with the exemption provision of this section.

Ex parte Johnson, 591 S.W. 2d 453 (Tx. 1979); See also Inzinna v. Inzinna, 456 So.2d 691 (La. App. 5th Cir. 1984) (holding that pursuant to 10 U.S.C.A. Section 1408 (a) (1), former wife was not entitled to former husband's military disability pension).

Federal Courts have held that the protection of the Veterans rights under Section 3101 should be exempt from creditor claims against the benefits and that Section 3101 must be liberally construed to protect funds granted by Congress for the maintenance and support of eligible veterans. Accordingly, any legal formulation or arrangement which could dilute

or evade the literal and historical thrust of this section's protection provision must be viewed with appropriate caution. American Training Service, Inc. v. Veterans Administration, 434 F. Supp 1988 (D.N. J. 1977); See also Porter v. Aetna Casualty and Surety Company, 370 U.S. 159, 82 S.Ct. 1231 (1962) (holding that Section 3101 should be liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof);

Lawrence v. Shaw, 300 U.S. 245, 57 S.Ct. 443 (1937). To award Mrs. Francis a portion of her exhusband's disability benefits, under the supremacy clause, would impermissibly conflict with the provisions of Section 3101. Under the analysis of Johnson, supra, to order Mr. Francis to pay his ex-wife a portion of his disability compensation, or its monetary equivalent, would run contrary to the language and purpose of the statute which exempts funds from the legal process and is intended to insure that benefits actually reach the

intended beneficiary. Id. at 455.

Again, "payments of benefits due . . . by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, . . ." pursuant to 38 U.S.C. Section 3101 (a). This statute clearly mandates that VA benefits are non-assignable unless authorized by the law. One of the very essence of contract law is that one must have the mental capacity to contract. In otherwords, the law does not authorize and it is against public policy to contract with a person lacking the competence to do so. Because the law does not authorize or condone contracting with a mentally incompetent person; the law does not authorize the assignment of VA benefits by a contract entered into with a person lacking the capacity to contract. The law of non-assignable VA benefits (38 U.S.C. Section 3101 (a)) and the law of capacity to contract (L.S.A. C.C. Art. 1918) are both a part of this states' judicial principles and

guidelines. To enforce one and not the other would be a grave injustice.

Not only does 38 U.S.C. Section 3101 mandate that VA benefits be non-assignable, it also states that such payments "shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The words "any legal or equitable process whatever" clearly suggests Congress' intent to ensure that Veterans benefits, such as Mr. Francis', are protected and secured for the sole purpose of disabled veterans use and maintenance for as long as the veteran is eligible to collect such benefits. Even if the alimony contract that Mr. Francis entered into had been legal and binding, Congress prohibits Mr. Francis' disability check from being subject to any such legal or equitable process. This statute is clearly designed to protect disabled veterans. Congress

anticipated that there would be disabled veterans such as Mr. Francis, unable to handle his own affairs because of a mental condition. Therefore, Congress provided this statute to protect those veterans that are unable to protect themselves. For this state not to enforce the very wishes of Congress would be a great injustice to the American veterans, and it would shock the conscious of society. Accordingly, the affidavit executed by Mr. Francis which assigned a portion of his disability compensation to Mrs. Francis is unlawful. Hence, the affidavit fails to constitute a valid contract because it was made for an unlawful cause.

A. The affidavit is unenforceable for failure of consideration.

In reasons for the judgment dated November 8, 1988, Judge Tobias determined that Mrs. Francis gave up contesting the divorce in exchange for her continued receipt of a portion of the disability pension. At trial on February 12, 1988, Mr. Francis testified

that he believed Mrs. Francis wanted to have him committed; he also stated that Mrs. Francis tormented him. (89-CA-1292, Vol. II, tr.pp. 83,86,89). As previously stated by Dr. Valle, Mr. Francis lived in constant fear of re-hospitalization. On September 2, 1987, Mr. Francis testified that he believed that the only way that he could get a divorce was to sign the affidavit. "Her attorney, Spencer in the one written this thing up. My attorney never did write anything up He said this is the only way I would be able to get a divorce if I would sign that. I didn't know what I was doing." (88-CA-0076, Vol. II tr. p. 10). Most importantly, on February 3, 1989, Mr. LaRose who represented Mr. Francis in the divorce proceedings stated that the affidavits made divorce simpler.

Q: You said that you prepared the affidavit for four hundred dollars a month for life?

A: That is correct.

Q: Did that make the divorce simpler?

A: Let me explain something to you, yes, I did make it simpler and I would like to explain that.

(89-CA-1292, Vol. III, tr. p. 12).

The affidavit, however, did not make the divorce simpler. Mr. Francis was entitled to a divorce as a matter of law based in having lived separate and apart from his wife for more than one year. Moreover, his pre-existing mental problem excused him from fault. Dolese v. Dolese, 517 So.2d. 1279 (La. App. 4th Cir. 1987) (affirming the decision of Judge Tobias that the findings that the husband suffered from mental incapacity is sufficient to excuse him from fault was adequately supported by evidence regarding his periodic treatment for mental problems, not withstanding or the lack of medical testimony in the divorce action). Accordingly, because of no benefit accrued to Mr. Francis, the contract was invalid for failure of consideration. See generally Interdiction of Burns, supra. (holding that transfer of property was invalid due to failure of consideration). To uphold the contract would

unjustly enrich Mrs. Francis. Pursuant to La. Civil Code Art. 1988, Mr. Francis had no cause to assign a portion of his disability benefits to his ex-wife. At such, the affidavit is null, void and unenforceable.

B. The Court of Appeal should have granted Mr. Francis' Exception of No Cause of Action.

Louisiana Code of Civil Procedure Article 2163 provides in pertinent part:

> The appellate court may consider the peremptory exception filed for the first time in that court, if it is pleaded prior to submission of the case for a decision, and if proof of the ground of the exception appears of record.

See also: Sanders v. P & S Ins. Co., 125 So.2d 24 (La. App. 1961). Due to the applicability of 38 U.S.C. 3101, the original petition of Mrs. Francis fails to state a cause of action. Her original suit was for a "portion of his monthly federal disability payments" See the Court of Appeal's first opinion in Francis v. Francis, 529 So.2d at 111 (La. App. 4th Cir. 1988). Because she is not entitled as matter of law, to these benefits, her petition does

not state a cause of action. The Court of Appeal erred by overruling the Exception of No Cause of Action and also by not even discussing the construction of 38 U.S.C. 3101 to the case and facts at bar. Only intervention by this court can correct this grievous error.

IV. CONCLUSION

Petitioner respectfully submits that the unrefuted testimony of Dr. Valle, Mrs. Francis' treating psychiatrist, clearly and convincingly establish that Mr. Francis lacked capacity at the time he executed the affidavit. Because there was no conflict in medical testimony, the lay testimony should not have been taken into consideration. As such great weight should have been accorded to the testimony of Dr. Valle. Thus, Mr. Francis met his burden of proving incapacity. In addition, in the original petition filed for support, Mrs. Francis admitted that her ex-husband was mentally disabled at the time that he executed the affidavit.

Alternatively, appellant submits that the affidavit is an invalid contract as a matter of law. Mr. Francis did not have capacity to contract; as such he was unable to truthfully give his consent. Furthermore, pursuant to 38 U.S.C. Section 3101, Mr. Francis' disability benefits are exempt from the claims of his creditors, Mrs. Francis. Congress intended to protect disabled veterans benefits from any legal process whatsoever. Mr. Francis' disability checks are prohibited as a matter of law from being subject to any contract, valid or not. Thus under Louisiana law, cause of this obligation is unlawful and unenforceable. Finally, appellant suggests that the affidavit is unenforceable due to failure of consideration. For the foregoing reasons, appellant respectfully requests that this Honorable Court reverse the trial court decisions that Mr. Francis had capacity to contract on February 10, 1983, and that the affidavit executed by Mr. Francis constituted a valid contract. Petitioner further requests

that this court enter a judgment in his favor.

WHEREFORE, petitioner prays that his application for remedial writs be filed in this honorable court, that a writ of certiorari issue herein ordering and commanding the Judges of the Civil District Court and Fourth Circuit Court of Appeal to send forthwith the original record of the above cause to this court for review of the judgment and rulings of the Courts and prohibiting the said judges from proceeding further in this case and the respondent from prosecuting it further until judgment shall be pronounced herein on the regularity of these proceedings; that the aforesaid Judges of the Civil District Court and Fourth Circuit Court of Appeal and the respondent be ordered to show cause in this court at a day and hour to be fixed by the court why the decision of the trial and appellate courts should not be reversed.

Respectfully submitted,

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BENITA FRANCIS — NO. 89-CA-1292

VERSUS — COURT OF APPEAL

AUGUST FRANCIS — FOURTH CIRCUIT

STATE OF LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT COURT, THE PARISH NO. 86-18743, DIVISION "L", HONORABLE MAX N. TOBIAS, JR. JUDGE

* * * * * * * *
CHARLES R. WARD
JUDGE
* * * * * * * *

Court composed of Judge Robert J. Klees, Robert L. Lobrano and Charles R. Ward)

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AFFIRMED

This is the second appeal in this suit by an

EXHIBIT
8

ex-wife to obtain a portion of her former husband's veteran disability benefits or in the alternative, alimony. The facts and issues are succinctly set forth in this Court's opinion in the first appeal Francis v. Francis 329 So. 2d 1110 (La. App. 4th Cir. 1988). The case was remanded solely for the factual determination of whether August Francis was competent to enter into a pre-divorce contract which settled the issue of past divorce alimony to Benita Porter Francis. After remand the Trial Court made a finding of fact that August Francis was indeed competent, the contract was valid, and August Francis was bound by its terms to pay $401.00 per month as alimony to Benita Francis.

The record supports the factual findings of the Trial Court; it is not manifestly erroneous.

We further find that Mr. Francis' second assignment of error is without merit.

Mr. Francis asserts that the contract is not perfected because it doe not have a legal

cause and because there was no consideration. That is not so. The contract has valid cause because it provides payments for Benita Francis in lieu of an alimony hearing. It also allows August Francis to take an uncontested divorce without litigating the issue of fault.

The affidavit itself states that Benita Francis will receive the payments. "... in consideration of the fact that she has raised their children and is in necessity of circumstances..."

We find no error in the Trial Court's ruling that the affidavit constituted a binding contract.

On July 27, 1990, counsel for Mr. August Francis filed an exception of no cause of action with this court. Counsel for Mr. Francis first urges that we dismiss the case because Title 38 U.S.C. Section 3101 exempts the payment of disability benefits from the claim of creditors. We do not consider Benita Francis to be a creditor.

We again note that the Trial Court concluded the affidavit is a contractual agreement, and because the trial court ruled that Mr. Francis had the capacity to contract, he was entitled to agree to make the payments out of his disability checks.

AFFIRMED

SUPREME COURT

STATE OF LOUISIANA

NO. _____

AUGUST FRANCIS

PETITIONER

VERSUS

BENITA FRANCIS

RESPONDENT

APPLICATION FOR WRIT OF CERTIORARI
ON BEHALF OF AUGUST FRANCIS DIRECTED TO
THE FOURTH CIRCUIT COURT OF APPEAL
PARISH OF ORLEANS, STATE OF LOUISIANA
NO. 89-CA-1292

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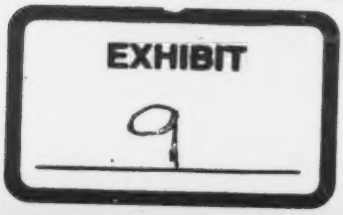

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SUPREME COURT

STATE OF LOUISIANA

NO. _____

AUGUST FRANCIS
PETITIONER

VERSUS

BENITA FRANCIS
RESPONDENT

APPLICATION FOR WRIT OF CERTIORARI
ON BEHALF OF AUGUST FRANCIS DIRECTED
TO THE FOURTH CIRCUIT COURT OF APPEAL
PARISH OF ORLEANS, STATE OF LOUISIANA
NO. 89-CA-1292

PETITION

This is the petition of August Francis, applying for a writ of certiorari directed to the Fourth Circuit of Appeal, Parish of Orleans, State of Louisiana.

I. STATEMENT OF THE CASE

A. INTRODUCTION

This is a case which presents issues not previously addressed by the Louisiana Supreme Court. Principal among these unaddressed issues is the applicability of Federal Veterans' Disability statutes to Louisiana Domestic Relations law. More specifically, 38 U.S.C. 3101, (a) exempts veteran disability payments from seizure or assignability. In the case at bar, the ruling below results in the assignment of Mr. Francis' veterans disability check to his former wife for alimony a result which violates the letter and spirit of 38 U.S.C. 3101 (a). Another previously unaddressed issue is the proper interpretation of those provisions of law related to the "capacity to contract", as embodied in the Civil Code.

Due to the fact that the Supreme Court has not addressed these important issues previously, a WRIT OF CERTIORARI must be

granted to clarify Louisiana law, and cure the substantial injustice which occurred below.

B. STATEMENT OF THE FACTS

In 1945, August Francis was discharged from the military as a mentally incompetent commonly known as "Section Eight Discharge". He received compensation from the Veterans Administration as one hundred percent (100%) disabled from his service connected condition from 1945 through the present date. He is not capable of employment as stated in a letter from the Veterans Administration dated October 30, 1986, Exhibit D-3.

Benita and August Francis were married in 1957. On April 22, 1966, Mr. Francis was interdicted pursuant to La. R.S. 29:351 et seq., and Benita Francis was appointed as his curatrix. Mr. Francis left the marital home in 1972 and during the ten years thereafter they did not communicate.

In 1983, Mr. Francis commenced divorce proceedings against Mrs. Francis. His

psychiatrist, Dr. Hector Valle, testified that he told Mr. Francis to get the advice of an attorney because "he was not in a condition to make decisions by himself" (Proceedings September 2, 1987, tr. p. 36). After filing suit, August Francis obtained an uncontested judgment of divorce by default on February 23, 1983. Benita Francis did not attend the court proceedings.

Prior to the Judgment of Divorce, Benita Francis retained Robert Landry, Esq. to negotiate a contract with August Francis and his attorney, J. Browne LaRose, Esq. for the purposes of obtaining a portion of your petitioner's disability pension with the United States government. On February 10, 1983, Mr. Francis executed an affidavit which assigned a portion of his Veterans disability pension to Mrs. Francis. However, the Veterans Administration stopped payment to the former spouse in June, 1984. Mrs. Francis filed suit for support on October 16, 1986, seeking to enforce the affidavit or

alternatively to obtain alimony.

C. DISPOSITION OF THE CASE BY THE COURTS BELOW

This case has a rather lengthy procedural history.

Most recently, the Fourth Circuit Court of Appeal affirmed the Civil District Court's decision holding that the petitioner was competent, the contract was valid, Mr. Francis was bound by its terms to pay $401.00 per month as alimony to Benita Francis, and also overruling Mr. Francis' Exception of No Cause of Action.

This matter was initially tried on September 28, 1987 before Judge Max Tobias, of Civil District Court for the Parish of Orleans where judgment was rendered in favor of Mr. Francis finding the affidavit null, void, and unenforceable. The petition for support was dismissed. Mrs. Francis appealed this ruling arguing that the interdiction of Mr. Francis was a limited one and that Louisiana law did not preclude the enforcement of the affidavit. The Fourth Circuit reversed, ruling that Mr.

Francis was not prohibited from contracting with Mrs. Francis to assign to her a portion of his benefits since the powers of curatorship were limited to those listed in the judgment of appointment. Mrs. Francis also argued that the trial court's record was not complete because she was giving an opportunity for rebuttal. The matter was therefore reversed and remanded.

The case was then again before Judge Max N. Tobias on November 4, 1988, where he reversed his earlier decision and held that the affidavit was binding. Mr. Francis filed for a new trial and his motion was granted. Again, the trial court ruled in favor of Mrs. Francis. Mr. Francis appealed that decision to the Fourth Circuit, and also filed a Exception of No Cause of Action in the Court of Appeal. The Fourth Circuit, in a two page ruling affirmed the trial court, failing to address thee applicability of 38 U.S.C. 3101 to Louisiana Domestic law but ruling that Mr. Francis was competent, the contract was valid,

and Mr. Francis was bound by its terms.

II. BASIS OF COURTS JURISDICTION

This is an appeal of a civil matter, heard by Judges Robert J. Klees, Robert L. Lobrano, and Charles R. Ward, of the Fourth Circuit Court of Appeal, after being tried in the Civil District Court for the Parish of Orleans, before Judge Max Tobias. This Court has jurisdiction pursuant to the provisions of the Louisiana Constitution, Article V, Section 5 (F). Petitioner shows that no appeal lies from the ruling of the Fourth Circuit, and remedial writs must be granted by the Supreme Court.

III. ISSUES AND QUESTIONS OF LAW

(1) Whether Mr. Francis was competent enough and had the capacity to enter into a pre-divorce contract which settled the issue of post divorce alimony to Benita Porter Francis when in fact Mrs. Francis knew or should have known that Mr. Francis was suffering from chronic paranoid schizophrenia with undergoing

psychiatric treatment and taking medication before, during and after the making of the contract, and she further knew that Mr. Francis lacked the capacity to contract.

(2) Whether as a matter of law mentally incompetent persons cannot contract when to do so would violate public policy and

(3) Because Mr. Francis' disability check is exempt from any seizure or assignment pursuant to 38 U.S. C. 3101.

IV. ASSIGNMENTS OF ERRORS

1. The courts below erred in determining that Mr. Francis had the capacity to contract on February 10, 1983.

2. The courts below erred in determining that the affidavit executed by Mr. Francis constituted a valid contract.

3. The courts below erred by failing to grant Mr. Francis' Exception of No Cause of Action based on the provisions of 38 U.S.C. 3101.

V. ARGUMENT ON ASSIGNMENTS OF ERROR

1. AUGUST FRANCIS LACKED THE CAPACITY TO CONTRACT WITH BENITA FRANCIS FOR POST DIVORCE ALIMONY.

In Louisiana, the law presumes capacity to contract La. Civil Code Art. 1918 provides:

All persons have capacity to contract,

except an emancipated minor, **interdicts and persons deprived of reason at the time of contracting.**

Such exceptions must be shown quite convincingly by the great weight of the evidence. First National Bank of Shreveport v. Williams 346 So.2d 257 (La. App. 3d Cir. 1977); Interdiction of Burns 486 So.2d 977 (La. App. 1st Cir. 1986).

The manifest error standard of review is inappropriate in the case at bar. The manifest error rule of appellate review weight only to the trial court's actual findings. The findings of the trial court will not be taken as conclusive on the issue of the probative value of testimony. Barriffe v. Ortiz 476 So.2d 371 (La. App. 4th Cir. 1985). Accordingly, in an evaluation of the sufficiency or preponderance of the evidence, the manifest error rule is inapplicable. Id. Furthermore, in determining mental capacity, great weight must be given to the testimony of the attending physician. See Succession of Lafferanderie 84 So.2d 442 (La. 1955).

A. Appellant has met his burden of proving

incapacity through the unrefuted testimony of his psychiatrist.

The record clearly shows by undisputed facts that Mr. Francis was discharged from the military in 1945 as a mentally incompetent person and he had qualified for 100% disability payments. Mr. Francis suffers from chronic paranoid schizophrenia and has been receiving psychiatric treatment and medication at the Veterans Administration Hospital in New Orleans for well over seventeen years.

The evidence previously introduced in trial court consisted of five exhibits as follows:

Exhibit D-1, medical record of the patient August Francis from Veterans Administration Medical Center for the period February 1, 1982 through November 29, 1983;

Exhibit D-2, letter from R. L. Stone, M.D., to Veterans ADministration contact office dated January 4, 1973;

Exhibit D-3, memorandum "To Whom It May Concern" from J. P. Clark, Veterans Services Officer dated October 30, 1986;

Exhibit D-4, medical record of patient August Francis from the Veterans Administration Medical Center for the period June 12, 1980 through May 29, 1987;

Exhibit D-5, entire record and proceedings No. 447-936 of the Civil District Court entitled Curatorship of August Francis.

In February of 1982, Mr. Francis was under the treatment and care of psychiatrist, Dr. Hector Valle. On September 2, 1987, Dr. Valle testified with respect to the condition of Mr. Francis in February of 1983. Dr. Valle testified that Mr. Francis' condition was diagnosed as chronic paranoid schizophrenia with marginal adjustments due to medications. (Emphasis Added) (Exhibit D-4 complete report of Veterans Administration dated July 24, 1984, problems oriented progress notes dated September 5, 1982 88-CA-0076 Vol. II, tr. p. 33) Dr. Valle further testified that Mr. Francis suffered delusion, distortion of reality. Dr. Valle stated that Mr. Francis had "delusion quite frequently". (88-CA-0076 Vol. II, tr, pp. 37,39).

Dr. Valle further testified that although Mr. Francis was not acting out in anyway, 'His capacity to function was diminished tremendously at times." (88-CA-0076, Vol. II tr. p. 38). Dr. Valle stated that Mr. Francis

was not in a condition to make decisions concerning a divorce by himself. (88-CA-0076, Vol. II, tr. p. 36).

On August 5, 1982, Dr. Valle prescribed "Thorazine 50 mgr one bid and II at hs #120; Stelazine 2mgr one QID #120; Congentin 2mgr daily # 30; Tylenol tablets II PRN pain #50; and Mylanta Tsp one P/C and PRN #5 bottles" for Mr. Francis. The foregoing is set forth in the medical record from the Veterans Administration, Exhibit D-1. Moreover Exhibit D-1 dated February 4, 1983 states PLAN: to avoid hospitalization by keeping him on drug therapy. Will continue with 1) Thorazine; 2) Stelazine; 3) Congentin; 4) Tylenol; 50 Mylanta". Id. (Emphasis Added).

The fact that Mr. Francis was taking medication did not make him totally capable according to Dr. Valle. (88-CA-0076. Vol. II,tr. p. 39). Dr. Valle testified that as long as Mr. Francis took medication, "he was not acting out in any way, but, of course, he was -- his capacity to function was diminished

tremendously at times>" (88-CA-0076 Vol. II, tr.p. 38). Additionally, Dr. Valle stated that the fact that Mr. Francis took medication did not make him totally capable. (88-CA-0076 Vol. II, tr.p. 39). When asked if his patient's judgment could have been affected in any contracts that he may have made, Dr. Valle responded "absolutely" (88-CA-0076, Vol. II, tr.p. 40).

Dr. Valle also testified that Mr. Francis was very self conscious about his disability and about other people's opinion of him. Mr. Francis believed people were making fun at him; he also believed that his wife wanted to tell everyone that he was a mental case. (88-CA-0076 Vol. II tr.pp. 37, 38). Dr. Valle further testified Mr. Francis was constantly fearful of in-patient services on the ninth floor at the Veterans Administration Hospital. "I don't recall exactly the date, but sometimes I thought he may need to be hospitalized, but Mr. Francis was so sacred of the ninth floor in-patient service, he was so

sacred, he said "No, please don't put me in the hospital." (88-CA-0076 Vol. II, tr. pp. 39,40).

The medical testimony presented by Dr. Valle on behalf of Mr. Francis is unrefuted. Mrs. Francis has not put on medical evidence to rebut the testimony of Dr. Valle. The trial court relied on the lay testimony of Mr. LaRose in determining whether Mr. Francis was deprived of reason on February 10, 1083.

Hence, the court erred in attributing any weight to the lay testimony presented. Louisiana jurisprudence have held that where there is no conflict in expert testimony, lay testimony will not be taken into consideration. Redmond v. Ouachita Coca-Cola Bottling Company, 76 So.2d. 553 (La. App. 2d Cir. 1954). The courts have stated that medical testimony should be conflicting before any significant value is attributed to lay testimony about an individual medical condition. O'Quin v. Southern Pipe and Supply Company, 216 So.2d. 320 (La. App. 3d Cir.

1968); See also Jackson v. United States Fidelity and Guaranty Company, 382 So.2d. 223 (La. App. 3d Cir. 1980) (holding that uncontradicted testimony of the psychiatrist concerning his diagnosis should have been given greater weight). Additionally, it is well settled that testimony of the attending physician should be given great weight. See generally Johnson v. R.P. Farnsworth and Company, 186 So.2d. 405 (La. App. 1st Cir. 1966).

In Interdiction of Burns, 486 So.2d. 977 (La. App. 1st Cir. 1986), plaintiff filed suit to rescind a pre-interdiction contract. The trial court found that the plaintiff did not have proper mental capacity to contract. The court's decision was based on the deposition of an expert in the field of psychiatry and the failure of the defendants to produce medical testimony. Id. at 979. The appellate court affirmed that decision. The Burns analysis is applicable to the instant case. Here, the trial court erred by failing to give

the unrefuted and uncontradicted medical testimony of Mr. Francis' treating psychiatrist, Dr. Valle, great weight. In fact, under the Redmond rule, the lay testimony of Mr. LaRose should not have been taken into consideration at all. Thus, under Redmond and Burns, Mr. Francis has shown quite convincingly and by great weight of the evidence that he lacked capacity to execute a contract on February 10, 1983. Accordingly, pursuant to the Louisiana Civil Code Article 1918, Mr. Francis was deprived of reason at the time of the contracting and thus did not have capacity to contract.

B. Mrs. Francis knew or should have known that Mr. Francis was mentally disabled.

Louisiana Civil Code Article 1925 provides as follows:

> A noninterdicted person who was deprived at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity.

On April 21, 1966, Mrs. Benita Francis filed

a Petition for the Interdiction of Mr. Francis pursuant to La. R.S. 29:351 et seq. A certificate of incompetency executed by the Chief Attorney of Veterans Administration was attached to that petition. This document certified that Mr. Francis had been rated incompetent by the Veterans Administration on an examination dated July 16, 1959. (See 88-Ca-0076, Supplemental Transcript).

On October 16, 1968, Mrs. Francis filed a petition seeking support from Mr. Francis. Paragraph VI of said petition states:

> "Upon information and belief, defendant (Mr. Francis) is mentally disabled and continues to receive Veterans Administration disability payments." (88-CA-0076 Vol. I. Petition for Support)."

Moreover, in proceedings held on February 12, 1988, Mrs. Francis admitted that Mr. Francis was hospitalized because of his mental condition. (89-CA-1292 Vol. II tr. p. 20). Mrs. Francis further admitted she went to the social worker at the Veterans Administration. (89-CA-1292, Vol. I, tr. p. 10). Most tellingly, Mrs. Francis admitted that Mr.

Francis received a check for 100% disability (the subject of this litigation because of his mental condition). (89-CA-1291, Vol. II tr. pp. 17-18). Accordingly, Mrs. Benita Francis knew or should have known that Mr. Francis suffered a 100% mental disability. Thus under Louisiana Civil Code Articles 402, 1918, and 1925, a contract in which Mr. Francis assigned a portion of his Veterans disability pension to Mrs. Francis is null and void because Mr. Francis lacked capacity to contract, and Mrs. Francis knew or should have known of his incapacity.

Furthermore, in the case of Fidelity Financial Services, Inc. v. McCoy, 392 So.2d. 118 (La. App. 1st Cir. 1980), the Court of Appeal of Louisiana affirmed the district court's decision in finding that the defendant lacked mental capacity to contract, that his condition was common knowledge in the community, and that the incapacity existed at the time of the contract. In the case of Fidelity Financial Services, Mr. McCoy was

discharged from the U.S. Army in 1960 because of his mental condition, and he has been receiving psychiatric treatment and medication at the V.A. hospitals in New Orleans and Gulfport ever since. His wife, son, and two other persons from the community testified that they knew and that it was commonly known in the communities that defendant was mentally incapable of handling his affairs. Mr. McCoy had later been interdicted. Mr. McCoy entered into a contract securing a loan for the purchase of an automobile, which was the subject of the suit. The plaintiff's only witness testified that "Mr. McCoy appeared to be normal." Id. at 119. The court implies that the plaintiff had the burden of proof in establishing that the contract was made during lucid intervals in order to make any attempts to avoid defendants' defense of insanity. The Fidelity case is analogous to the case at bar. Both cases involve discharged veterans on 100% disability, unable to handle their own personal affairs, and commonly known

throughout the community to be mentally incompetent. More Importantly, both Mr. McCoy and Mr. Francis were two incompetent individuals undergoing psychiatric treatment and medication before, during, and after the making of the contracts in dispute; and lacking the full capacity to enter into any legally binding affair, although they both "appeared" to be normal.

In Fidelity, "the plaintiff failed to carry his burden of proof that the contract was made during a lucid interval." Id. at 119. Dr. Valle testified as to Mr. Francis having marginal adjustments due to his medication. Mr. Francis contends that Mrs. Francis failed to establish as a matter of fact that he freely bargained and mutually consented to a pre-divorce alimony contract during a time he experienced a lucid interval if indeed he experienced any marginal adjustment at that time at all. This court should render any doubts in favor of Mr. Francis and adopt the decision of the court in Fidelity by

rescinding the alimony contract.

II. THE AFFIDAVIT EXECUTED BY MR. FRANCIS IS AN INVALID CONTRACT BECAUSE IT VIOLATES LOUISIANA LAW AS WELL AS FEDERAL LAW.

There are four elements required for the confection of a valid contract:

1. The parties must have capacity to contract;
2. The contract must have a lawful purpose;
3. There must be certain object for the contract; and
4. The parties' mutual consent must be freely given. The document at issue in the instant litigation fails as a valid contract on all four points. First, Mr. Francis lacked capacity to contract, and Mrs. Francis knew that Mr. Francis was incompetent and deprived of reason at the time of contracting as stated above. Because Mr. Francis was incapacitated he was incapable of freely giving consent by operation of law. Second, the contract at issue does not have a lawful purpose. La Civil Code Art. 1968 defines unlawful cause as follows:

> The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

Furthermore, pursuant to La. Civil Code Art. 1894, obligations which are exempt from seizure are not subject to compensation. Under Federal law the disability benefits at issue here are non-assignable. The Veterans Administration letter dated October 30, 1986, to whom it may concern states:

> The Veterans Administration has no authority to apportion VA benefits to a divorced spouse per 38 U.S.C. 3107 and 101 (31). Title 38 U.S.C. 3101 defines a non-assignability and exempt status of Veterans Administration benefits.

Section 3101 provides in pertinent part that "payments of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent authorized by the law. . ." The provision of this section that payments of benefits under any law administered by the Veterans Administration shall be exempt from the claim of creditors is intended to protect

the recipient of these benefits. State ex rel. Eastern State Hospital v. Beard, 600 p.2d 324 (Okl. 1979). Additionally, a Texas court held that an award for divorced wife of 50% of her husband's anticipated future disability benefits from the Veterans Administration conflicted with the clear intent of Congress that such benefits should be solely for the use of disabled Veterans, and the diversion of future payments was in conflict with the exemption provision of this section.

Ex parte Johnson, 591 S.W. 2d 453 (Tx. 1979); See also Inzinna v. Inzinna, 456 So.2d 691 (La. App. 5th Cir. 1984) (holding that pursuant to 10 U.S.C.A. Section 1408 (a) (1), former wife was not entitled to former husband's military disability pension).

Federal Courts have held that the protection of the Veterans rights under Section 3101 should be exempt from creditor claims against the benefits and that Section 3101 must be liberally construed to protect funds granted

by Congress for the maintenance and support of eligible veterans. Accordingly, any legal formulation or arrangement which could dilute or evade the literal and historical thrust of this section's protection provision must be viewed with appropriate caution. American Training Service, Inc. v. Veterans Administration, 434 F. Supp 1988 (D.N. J. 1977); See also Porter v. Aetna Casualty and Surety Company, 370 U.S. 159, 82 S.Ct. 1231 (1962) (holding that Section 3101 should be liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof);

Lawrence v. Shaw, 300 U.S. 245, 57 S.Ct. 443 (1937). To award Mrs. Francis a portion of her exhusband's disability benefits, under the supremacy clause, would impermissibly conflict with the provisions of Section 3101. Under the analysis of Johnson, supra, to order Mr. Francis to pay his ex-wife a portion of his disability compensation, or its monetary equivalent, would run contrary to the language

and purpose of the statute which exempts funds from the legal process and is intended to insure that benefits actually reach the intended beneficiary. Id. at 455.

Again, "payments of benefits due . . . by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, . . ." pursuant to 38 U.S.C. Section 3101 (a). This statute clearly mandates that VA benefits are non-assignable unless authorized by the law. One of the very essence of contract law is that one must have the mental capacity to contract. In otherwords, the law does not authorize and it is against public policy to contract with a person lacking the competence to do so. Because the law does not authorize or condone contracting with a mentally incompetent person; the law does not authorize the assignment of VA benefits by a contract entered into with a person lacking the capacity to contract. The law of non-assignable VA benefits (38 U.S.C. Section 3101

(a)) and the law of capacity to contract (L.S.A. C.C. Art. 1918) are both a part of this states' judicial principles and guidelines. To enforce one and not the other would be a grave injustice.

Not only does 38 U.S.C. Section 3101 mandate that VA benefits be non-assignable, it also states that such payments "shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The words "any legal or equitable process whatever" clearly suggests Congress' intent to ensure that Veterans benefits, such as Mr. Francis', are protected and secured for the sole purpose of disabled veterans use and maintenance for as long as the veteran is eligible to collect such benefits. Even if the alimony contract that Mr. Francis entered into had been legal and binding, Congress prohibits Mr. Francis' disability check from

being subject to any such legal or equitable process. This statute is clearly designed to protect disabled veterans. Congress anticipated that there would be disabled veterans such as Mr. Francis, unable to handle his own affairs because of a mental condition. Therefore, Congress provided this statute to protect those veterans that are unable to protect themselves. For this state not to enforce the very wishes of Congress would be a great injustice to the American veterans, and it would shock the conscious of society. Accordingly, the affidavit executed by Mr. Francis which assigned a portion of his disability compensation to Mrs. Francis is unlawful. Hence, the affidavit fails to constitute a valid contract because it was made for an unlawful cause.

A. The affidavit is unenforceable for failure of consideration.

In reasons for the judgment dated November 8, 1988, Judge Tobias determined that Mrs. Francis gave up contesting the divorce in

exchange for her continued receipt of a portion of the disability pension. At trial on February 12, 1988, Mr. Francis testified that he believed Mrs. Francis wanted to have him committed; he also stated that Mrs. Francis tormented him. (89-CA-1292, Vol. II, tr.pp. 83,86,89). As previously stated by Dr. Valle, Mr. Francis lived in constant fear of re-hospitalization. On September 2, 1987, Mr. Francis testified that he believed that the only way that he could get a divorce was to sign the affidavit. "Her attorney, Spencer in the one written this thing up. My attorney never did write anything up He said this is the only way I would be able to get a divorce if I would sign that. I didn't know what I was doing." (88-CA-0076, Vol. II tr. p. 10). Most importantly, on February 3, 1989, Mr. LaRose who represented Mr. Francis in the divorce proceedings stated that the affidavits made divorce simpler.

Q: You said that you prepared the affidavit for four hundred dollars a month for life?

A: That is correct.

Q: Did that make the divorce simpler?

A: Let me explain something to you, yes, I did make it simpler and I would like to explain that.

(89-CA-1292, Vol. III, tr. p. 12).

The affidavit, however, did not make the divorce simpler. Mr. Francis was entitled to a divorce as a matter of law based in having lived separate and apart from his wife for more than one year. Moreover, his pre-existing mental problem excused him from fault. Dolese v. Dolese, 517 So.2d. 1279 (La. App. 4th Cir. 1987), (affirming the decision of Judge Tobias that the findings that the husband suffered from mental incapacity is sufficient to excuse him from fault was adequately supported by evidence regarding his periodic treatment for mental problems, not withstanding or the lack of medical testimony in the divorce action). Accordingly, because of no benefit accrued to Mr. Francis, the contract was invalid for failure of consideration. See generally Interdiction of

Burns, supra. (holding that transfer of property was invalid due to failure of consideration). To uphold the contract would unjustly enrich Mrs. Francis. Pursuant to La. Civil Code Art. 1988, Mr. Francis had no cause to assign a portion of his disability benefits to his ex-wife. At such, the affidavit is null, void and unenforceable.

B. The Court of Appeal should have granted Mr. Francis' Exception of No Cause of Action.

Louisiana Code of Civil Procedure Article 2163 provides in pertinent part:

> The appellate court may consider the peremptory exception filed for the first time in that court, if it is pleaded prior to submission of the case for a decision, and if proof of the ground of the exception appears of record.

See also: Sanders v. P & S Ins. Co., 125 So.2d 24 (La. App. 1961). Due to the applicability of 38 U.S.C. 3101, the original petition of Mrs. Francis fails to state a cause of action. Her original suit was for a "portion of his monthly federal disability payments" See the Court of Appeal's first opinion in Francis v.

Francis, 529 So.2d at 111 (La. App. 4th Cir. 1988). Because she is not entitled as matter of law, to these benefits, her petition does not state a cause of action. The Court of Appeal erred by overruling the Exception of No Cause of Action and also by not even discussing the construction of 38 U.S.C. 3101 to the case and facts at bar. Only intervention by this court can correct this grievous error.

IV. CONCLUSION

Petitioner respectfully submits that the unrefuted testimony of Dr. Valle, Mrs. Francis' treating psychiatrist, clearly and convincingly establish that Mr. Francis lacked capacity at the time he executed the affidavit. Because there was no conflict in medical testimony, the lay testimony should not have been taken into consideration. As such great weight should have been accorded to the testimony of Dr. Valle. Thus, Mr. Francis met his burden of proving incapacity. In addition, in the original petition filed for

support, Mrs. Francis admitted that her ex-husband was mentally disabled at the time that he executed the affidavit.

Alternatively, appellant submits that the affidavit is an invalid contract as a matter of law. Mr. Francis did not have capacity to contract; as such he was unable to truthfully give his consent. Furthermore, pursuant to 38 U.S.C. Section 3101, Mr. Francis' disability benefits are exempt from the claims of his creditors, Mrs. Francis. Congress intended to protect disabled veterans benefits from any legal process whatsoever. Mr. Francis' disability checks are prohibited as a matter of law from being subject to any contract, valid or not. Thus under Louisiana law, cause of this obligation is unlawful and unenforceable. Finally, appellant suggests that the affidavit is unenforceable due to failure of consideration. For the foregoing reasons, appellant respectfully requests that this Honorable Court reverse the trial court decisions that Mr. Francis had capacity to

contract on February 10, 1983, and that the affidavit executed by Mr. Francis constituted a valid contract. Petitioner further requests that this court enter a judgment in his favor.

WHEREFORE, petitioner prays that his application for remedial writs be filed in this honorable court, that a writ of certiorari issue herein ordering and commanding the Judges of the Civil District Court and Fourth Circuit Court of Appeal to send forthwith the original record of the above cause to this court for review of the judgment and rulings of the Courts and prohibiting the said judges from proceeding further in this case and the respondent from prosecuting it further until judgment shall be pronounced herein on the regularity of these proceedings; that the aforesaid Judges of the Civil District Court and Fourth Circuit Court of Appeal and the respondent be ordered to show cause in this court at a day and hour to be fixed by the court why the decision of the trial and appellate courts should not be

reversed.

Respectfully submitted,

MARC H. MORIAL
A PROFESSIONAL LAW CORPORATION

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ATTORNEY FOR AUGUST FRANCIS,
PETITIONER

STATE OF LOUISIANA

PARISH OF ORLEANS

Marc H. Morial being duly sworn, deposed and said that he is the attorney for the petitioner in the above and foregoing application for remedial writs of prohibition, mandamus and certiorari; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to respondent Department of Health and Hospitals Office of Charity Hospital of Louisiana through their attorney of record Phillip H. Kennedy, Esq., the State Civil Service Commission, through their Director, Herbert L. Sumrall postage prepaid, and a copy mailed to the First Circuit Court of Appeal the Honorable J. Louis Watkins, Burrell J. Carter, and Frank Foil postage prepaid.

_____

MARC H. MORIAL

SWORN TO AND SUBSCRIBED
BEFORE ME THIS _____ DAY
OF _____, 1991

_____

NOTARY PUBLIC

STATE OF LOUISIANA

PARISH OF ORLEANS

Marc H. Morial being duly sworn, deposed and said that he is the attorney for the petitioner in the above and foregoing application for remedial writs of prohibition, mandamus and certiorari; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to respondent Department of Health and Hospitals Office of Charity Hospital of Louisiana through their attorney Robert Grant, Esq. postage prepaid, and a copy mailed to the Respondent Judge of the Civil District Court, Honorable Max N. Tobias, and Fourth Circuit Court of Appeal the Honorable Robert Klees, Robert Lobrano, and Charles Ward postage prepaid.

_____

MARC H. MORIAL

SWORN TO AND SUBSCRIBED
BEFORE ME THIS _____ DAY
OF _____, 1991

_____

NOTARY PUBLIC

THE SUPREME COURT OF THE STATE OF LOUISIANA

BENITA FRANCIS

VS.

AUGUST FRANCIS NO. 91-C- 1566

- - - - - -

IN RE: Francis, August ; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 89CA-1292; Parish of Orleans Civil District Court Div. "L" Number 86-18743

- - - - - -

October 11, 1991

Denied

PFC

WFM

JLD

JCW

HTL

LFC

PH

Supreme Court of Louisiana
October 11, 1991

Clerk of Court
For the Court

EXHIBIT
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